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INTERNATIONAL SELF-HELP *

" My mighty and unbounded will
Is broken on yon sandy hill."

THE hill is that of Baucis and Philemon; the lamentation, that of Faust, arrived at the pinnacle of world dominion, lacking only the few linden trees of two inoffensive peasants. The hill might equally have been that of Naboth; the lamentation, that of Achab. The hill might have been even an insignificant tree; the lamentation, that of Alexander or a Caesar. The lust of power, as every form of lust, is insanity, an end unto itself, insatiable. Its victim, devoid of intellectual restraint, yields himself complacently to its voracity, too drunk to recall the poet's words,

" When that this body did contain a spirit,
A kingdom for it was too small a bound;
But now two paces of the vilest earth
Is room enough! "

It is a lust that wars against the Cosmos, promoting either Chaos or the Anti-Cosmos, depending upon its restricted or unlimited sway. By a strange paradox, its sphere is the more restricted in the degree in which it affects a greater number of

* Delivered by Rev. Jerome D. Hannan, LL.B., S.T.D., J.C.D., associate professor of Canon Law of the School of Canon Law of The Catholic University of America, at the final conference of 1945-46 of the Riccobono Seminar of Roman Law in America, in McMahon Hall Auditorium at the University, May 16, 1946.

men, for then the opportunities for its satisfaction are controlled by the antagonism of others. It is when one man has so subdued his fellows that only he remains its victim that its dominance is unchallenged, expressed with unchallenged arrogance through the will of the lord of all.

In their love for the Cosmos, the poet and the philosopher have consistently struggled to restrain this lust and the restraint which they found it possible to impose at any time they reposed in the judiciary, supported, preferably by religion rather than by force, an ally which they hesitated to employ because of the stigma attaching to it through its affiliation with the lust they sought to restrain. Indeed, as shall be indicated, the necessary force was not available to them in the infancy of the race, and religion was their chief support; though by degrees the very agency which they devised to champion the preservation of social peace, the judiciary, succumbed itself to the lust they fought, at least to the degree sufficient to enforce its will.

It was probably not so apparent to the first philosopher who thought of the judiciary as it is to us, that in this juridical institute was the hope that pledged civilization to the barbaric world. The functions of the judge in the preservation of order are now so manifest that one need not be a jurist to be convinced of their effectiveness, even at times of their exclusive effectiveness. Even in the world of sport, the role of the umpire, honored with its own kind of dignity, is esteemed for its function in promoting the orderly progress of the game. Indeed, the umpire is at once judge, witness, and executioner; a judge of fact and of law. But in a wide sense, his functions are those of a judge rather than of an arbiter. Moreover, he not only renders the verdict and imposes the sentence, but he also executes it, a function that the earliest of the philosophers could not assign to the judiciary because of its and their own impotence.

Indeed, it is rather clear that the highest function they could assign it was that of rendering the verdict, suspending

the private act of violence only long enough to determine whether it was a violation of religion or not. In this determination consisted the verdict, after which execution was allowed the plaintiff according to his own designs. In this first step towards a judiciary, it is obvious that the *exceptio* initiated the action rather than the *actio*. The plaintiff was the respondent, his action of self-help being postponed until the plea of the defendant was established as unfounded. In the event that it was proved well founded, the social power was then invoked as a form of sentence to deny the plaintiff the use of the self-help to which he laid claim. In illustration one might point to the judges who determine the outcome of a race. They determine the winner, but give no help to the man who attempts to collect a wager he has made. He is left to his own resources even when the decision favors his claim.

On the international scene, the philosopher finds himself today in a position similar to that of his colleague of barbaric times, whose thirst for municipal peace devised the judiciary, at first functioning only in a rudimentary fashion, but gradually developing into the highest municipal guarantee against internal chaos on the one hand, and despotism on the other. Forgetful of the patience of his colleague of an earlier day, impetuously complaining that the effectiveness of the municipal judiciary cannot be transplanted onto the field of international relations, he yields protestingly, reluctantly, and resentfully to a compromise, which to his counterpart of barbaric times would have been hailed as a successful step toward the realization of his aims. The difference in the judgment made by the men of the two eras is that a different standard of measurement is employed by them. The one was measuring the frugal benefits gained against the municipal chaos which had been to a degree dissipated by the compromise; the other is measuring the latter, not against the international chaos that may be in some degree ameliorated, but against the municipal peace that is the culmination of a series

of successes achieved by the judiciary, each one creating the environment for the next. More, the philosopher of our day blinds himself to a factor that was available to his counterpart of barbarian times but that is not now accepted as the basis of the device for peace.

That factor was religion. That factor was not only religion, but unity of religion. The philosopher need not pridefully point to the functioning of the municipal judiciary in the absence of religion, as if it depended on might alone. There is only one end to the rule of might, even if exercised by a judiciary. That end is Chaos or Anti-Cosmos; either a judiciary despised or a judiciary supreme master of the souls of all. In fact whether the modern philosopher recognizes it or not, the municipal judiciary exists as an institution, the fruit of its traditional development, the repository of the respect that was won for it by religion. More, it exists in the midst of sustaining institutions that were likewise established and developed through the sanctions of religion. How often have not our own courts repeated the assertion that, in spite of the freedom of religion guaranteed first by the First Amendment in the Bill of Rights in respect of the acts of Congress, and now by the Fourteenth Amendment under judicial construction in respect of the acts of State legislatures, this is a Christian country! In this affirmation may be found their own realization, dim though it may sometimes appear to be, of the underlying basis of their effectiveness: not only religion, but unity of religion.

If the unavailability of this element to the craftsman of our day should not plunge him into total despair in regard to the salvaging of world order, it should at least remind him that he must not be impatient with the failure of his attempts to accomplish immediately through a judiciary on the world scene the same beneficent results that attend the functioning of his municipal courts.

He should convince himself that the first steps toward a judiciary were rudimentary. Even historic codes and tables point to this. Moreover, they reminiscently refer to even greater primitiveness of the judiciary in a pre-historic time. As an example of the others, one recalls the rather elementary judicial procedure promulgated in the Mosaic law (*Numbers,* xxxv, 9-34). Six cities of refuge were appointed, into which one guilty of justifiable homicide might flee and be immune to the act of self-help imposed by the law upon the kindred of the slain man. The act of self-help was death, and this could not be waived in the acceptance of a money payment. No wergeld was allowed. However, once the guilty person had entered the city of refuge, the case was to be debated between him and the next of kin in the presence of the people. Apparently the verdict was rendered by the people. If it was favorable, the guilty person was delivered from the hand of the revenger and taken back to the city of refuge, in which he was required to dwell until the death of the incumbent high priest. If he departed from the city in the interval, the revenger was authorized to kill him.

Self-help, then, as a means of enforcing verdicts rendered by international tribunals should not be too difficult to tolerate, at least as a necessary step towards that effectiveness now enjoyed by municipal courts. The Security Council's powers in the United Nations Organization represents a step in advance of the competence of the Permanent Court of International Justice set up by the League of Nations Covenant. Now the international tribunal may intervene on its own motion, whereas previously it could do so only at the request of the nation against which war or aggression was contemplated. That the machinery of enforcement seems not yet available is to be lamented. Still, if international control of self-help is firmly entrenched to the degree that the aggressor may not avenge his real or fancied injury until his right to do so has been tried before a tribunal of adequate competence, and perhaps not even then if the tribunal finds he has suffered no in-

jury, then war will have been brought under judicial control. It matters not that the latter's machinery of enforcement may depend upon the negative protection it can give the nation attacked by juridically enjoining the aggressor or, on the other hand, upon the self-help of the aggrieved nation. For the latter's war in prosecution of the allowed self-help is given the character of a just war, even in the legal concept of the term, a war in execution of a judicial verdict; and the negative protection afforded the former against the aggressor, if exercised consistently, is the foundation on which an adequate customary sanction may ultimately be built.

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European Aftermath

The Hon. Myron C. Taylor will remain at the Vatican, according to the statement of the President of the United States, as his personal representative until the peace of the world is achieved. However, in the middle of August Mr. Taylor made a return trip to the United States, his assistant, Franklin Gowan, carrying on his duties in Rome in his absence.

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John Foster Dulles, Chairman of the Commission on a Just and Durable Peace of the Federal Council of the Churches of Christ in America, was named Vice Chairman of the International Protestant Commission on International Affairs set up at Cambridge, England, early in August by the World Council of Churches meeting there, representing 94 Protestant and Orthodox churches in 34 countries. The aim of the new Commission is to achieve some kind of understanding with the Vatican as a basis for international action in the prosecution of peace.

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BORROWINGS IN ROMAN LAW AND CHRISTIAN THOUGHT *

THIS paper is intended primarily as a study in the history of ideas. Its purpose is not to analyze specific institutions, such as pledges, mortgages, bailments, *pacta, fideicommissa,* or similar legal devices which may relate to the borrowing or holding of material things belonging to another. Neither is it concerned with comparing techniques, such as different methods of taking testimony, in the major legal systems. Although it is essentially philosophical in its viewpoint, it does not propose to treat of the sources, the function, or the aims of law, as the German and Italian philosophical jurists have done. Nor will this paper presume to discuss the relationship between ethics or morality and law, a subject

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, April 11, 1946, in the Saint Thomas More Library of the Law School at The Catholic University of America, Washington, D. C.

[The reading of the paper was prefaced with the following salutation.] Magister et Doctores:

When I first came to The Catholic University of America as a student, the name of Professor Riccobono was appearing frequently on bulletin boards and in press notices, as an eminent and special lecturer here in Roman Law. I was still too new to the University and too timid to presume to enter the erudite circle which surrounded him, and so, although I was on the same campus at the same time, I never saw him. But what he stood for influenced me deeply. And so when, a year or two later, I was privileged to begin serious work in philosophy under Dr. Pace, I undertook to think about the Common Law and its relations to Scholastic thought somewhat after the manner that I had learned Dr. Riccobono was looking at the *Fontes* of Roman Law and Patristic thought. Dr. Pace not only encouraged me in this, but gave me the widest possible scope in which to develop such a thesis, and he drew upon his own incomparable learning,—and, occasionally, upon Dr. Bernardini's,—for new insights to guide me in that orientation. The paper which I offer tonight is the outline of a chapter in the development of the narrative of the influence of Christian thought on law, a narrative which I hope one day may be told in its fulness. I am greatly honored to be invited to contribute this paper to the distinguished Seminar which acknowledges the leadership of Salvatore Riccobono.

which has tripped up the sturdiest explorers in that uncharted field of brambles.

On the other hand, although it is concerned with the history of *ideas,* this paper is not devoted to a survey of *ideals,* such as Dean Pound made in his notable *Jubilee Law Lectures* at The Catholic University of America in 1939.[1] In fact, from the standpoint taken here, it would be philosophically erroneous to imply that the only alternative to an unacceptable materialism in legal thinking is an exaggerated idealism, in the manner of Plato and Hegel. But in holding to a middle way between the two extremes, the paper does not present merely a chronology of natural law theories, in the way the Carlyles[2] and C. G. Haines[3] have done in recent years. Above all, it is not concerned with the history of political theory, even though it may include John of Salisbury and his recent commentators, in its survey.

Having thus noted the stakes which set off the claims of others, a pretty large area is found still unexplored, which remains to be mapped out here. It is the area where established legal rules met the impact of Christian thinking, and where Christianity encountered the law. The exploration of it is primarily an investigation of facts, an effort to determine what happened when a system devised to govern the behavior of human beings, largely through physical sanctions, came into contact with a system devised to develop the character of human beings through promises of eternal reward or punishment. It is essentially a study in reality. If its scope be properly understood, and if its technique be worked out with requisite insight, the development of this approach to legal thinking should result in the attainment of that realistic jurisprudence which is currently so widely sought.

[1] Washington, D. C., 1939.

[2] Carlyle, R. W., and A. J., *A History of Medieval Political Theory in the West,* (5 vols., Edinburgh, 1903-1928).

[3] *The Revival of Natural Law Concepts,* (Cambridge, Mass., 1934).

Taking the facts, then, which have been authenticated by history, the most remarkable is the fact that Roman Law and Christianity grew up together,—that is, that both reached their greatest development in a period which covered the same centuries. This coincidence is not found in the history of art, of archaeology, or of the classical languages and literatures. In art, architecture, and literature, great heights were achieved in pagan times, but when Christianity arrived, decadence had begun to set in. When art and architecture and literature reached new heights again, they were no longer pagan but Christian in their inspiration. The same situation does not exist with respect to Roman Law. To be sure, the *ius civile* had been perfected and the pretorian law was on its road to its greatest development when the Christian era began, but both systems, and especially the latter, were not repudiated but absorbed in the work of codification, so that Gaius, who perhaps can be said to mark the culmination of the law in pagan times, was indeed the foundation upon which the Code of Justinian was built in a great Christian era. This is not to say that paganisms did not survive in the Code. Neither is it to accept the thesis that Justinian was the model Christian lawgiver. Rather the point is made that the genius for human living which marked the Roman Empire at its best, found not frustration but fulfillment in the Christian conquest of the mind.

Roman Law and Christian doctrine were both enduring in developing that civilization and culture which overcame barbarism. To be sure, there were earlier influences to be reckoned with by both. There was the Code of Hammurabi and the Mosaic Code with the Decalogue, among Semitic peoples, which were antecedent to Christian teaching. And there was the Greek law, so well documented for us by Drs. Bonner and Calhoun,[4] which, through Stoic thought, reached Roman leaders like Cicero and Marcus Aurelius. The streams

[4] Calhoun, George M., and Catherine Delamere, *A Working Bibliography of Greek Law,* (Cambridge, Mass., 1927). Works of R. J. Bonner and Gertrude Smith are listed at pages 14 and 119.

met in the time of Caesar Augustus, Cyrinus being Governor of Syria, when, as Saint Luke tells us,[5] Joseph went with Mary from Nazareth to Bethlehem in order to be enrolled in the Roman census. They met again when Matthew, the tax-collector, left his employment as a public servant to become an Apostle of Christ.[6] And they met in Paul of Tarsus, the Jewish Apostle to the Gentiles, who, being a Roman citizen from his birth, relied upon the prerogatives of that citizenship to further his preaching mission.[7] When the difficult years of persecution were over, it was the facilities of the Roman roads, as well as the far-flung unified government of the Roman Empire, which facilitated the Christianization of the civilized world.

Even more important for the purpose of this study is the interchange of concepts by which Roman Law was utilized in the teaching of Christian doctrine. How early this practice began deserves study. An excellent beginning has recently been made in two doctoral dissertations, one at The Catholic University of America by Dr. Martin,[8] and one at the University of Ottawa, by Dr. Allie, O.M.I.,[9] in which Tertullian's contribution to Christian apologetics through his utilization of the legal institution of *prescriptio,* is carefully documented. In the glorious fourth and fifth centuries, there is the work of Ambrose, the lawyer who became Archbishop of Milan and a Doctor of the Church, and who holds an important place in this study because of the Christianization of the *De Officiis* of Cicero, which he borrowed for the purpose. Of Saint Augustine's knowledge and use of Roman Law, in his *De Civitate*

[5] Luke, 2, 1-7.

[6] Matthew, 9, 9.

[7] Acts, 22, 25-29.

[8] Martin, Thomas Owen, *Adverse Possession, Prescription and Limitation of Actions. The Canonical "Praescriptio".* The Catholic University Canon Law Series, n. 202 (Washington, D. C., The Catholic University Press, 1944).

[9] Allie, Jean-Léon, *L'Argument de Prescription dans le Droit Romain, en Apologètique, et en Théologie Dogmatique,* (Ottawa, 1940).

Dei, particularly, Dr. Lardone has given scholarly proof in the article he contributed to the *Georgetown Law Journal* in 1933.[10] The most extensive and complete analysis yet made on any of these Latin Fathers as jurists was done in 1937 at the Catholic University of the Sacred Heart at Milan by Monsignor Violardo on Saint Jerome.[11] This is indeed a source book of the first class for any study of the borrowings in Roman Law and Christian thought, for in it evidence of Saint Jerome's introduction and use of concepts like *bona fides pacta sunt servanda, nulla poena sine lege,* marriage until death, equality, and similar doctrines, are thoroughly weighed and analyzed. There is even weighty evidence produced to claim for Saint Jerome the authorship of that remarkable volume, *Mosaicarum et Romanorum Legum Collatio,* a book long attributed to Saint Ambrose because of his known membership in the legal profession.

During the sixth century, of course the codification of the Roman Law under Justinian marks the high point of Roman Law. And while Justinian placed that codification under Christian patronage to such a degree that a recent author, Dr. Biondi of Milan, has written of him as the prince of Christian jurists,[12] nevertheless he did not eliminate entirely many of the paganisms which had come down through the history of the Roman Law. Nor was it necessary or desirable that he should do so. The essential thing about any legal system is that it be maintained and observed in all ways which are not in serious conflict with truth and goodness, for through law both truth and goodness are preserved for posterity. The remarkable thing about the codification made under Justinian was not the number of paganisms that were retained, but rather the number of Christian ideas which were incorporated

[10] "Roman Law in the Works of St. Augustine,"—*Georgetown Law Journal,* XXI (1933), 435-456.

[11] *Il Pensiero Giuridico di San Girolamo,* (Milan, 1937).

[12] Biondi, Biondo, *Giustiniano Primo Principe Legislatore Cattolico,* (Milan, 1936).

into the Code. The thinking of Tertullian and Ambrose and Augustine and Jerome and the rest about law had not been in vain, since the borrowings the Christians had made from the law were now returned with interest in the borrowings the Code made from the Fathers. Besides the work of Drs. Violardo and Biondi, excellent papers demonstrating instances of these borrowings were contributed to the volumes of the Proceedings of the International Juridical Congress held at Rome in 1935,[13] as well as in a volume published the same year at Milan, entitled *Cristianesimo e Diritto Romano,* to which Drs. Melchiore Roberti, Bussi, and others were contributors.[14] It is to be hoped that the interruptions necessitated by the war will have afforded the opportunity for the planning, if not the completion, of further studies along these lines.

One year before Justinian was born, Boethius (475?-525?) had died, and five years before Justinian (527-565) died, Saint Isidore of Seville (560?-636) was born. Neither Boethius nor Isidore lived in close proximity to the seat of the Empire, but both were influenced by its power, and they in their turn were channels through which the spirit of the Christianized Roman Law was preserved in the West. For over five hundred years (711-1492), the development of Roman Law and Christian thought had been blotted out in Spain by the Moorish invasion, but when that cloud was lifted, the Visigothic Codes, which Alaric (506) had built upon the Theodosian Code (438) and some Christianized concepts, bore new fruit in serving as the foundation for the great legal development of the thirteenth century under Alfonso X. The contribution of the Visigoths to the parallel growth of law and Christian thought can be followed in two dissertations, done at Fordham University and at The Catholic University of America, respectively, by Dr. Marie Madden [15] and by Dr. A. K. Ziegler,[16] in 1930.

[13] Congresso Internazionale Giuridica, Roma, 1935, *Acta.*

[14] Milan, 1935.

[15] *Political Theory and Law in Medieval Spain,* (New York, 1930).

[16] *Church and State in Visigothic Spain,* (Washington, D. C., 1930).

With the return of Hispania to Christian hands between the 13th and 15th centuries, Spain once more took her place in the main course of legal development and Christian thought, which found its height in Vitoria and Suarez in the 16th century with the birth of international law.

Parallelling the Spanish chapter on borrowings is an equally interesting Irish chapter, which it was the lifework of the late Dr. Eoin McNeill to document. One of the most important studies in this field is the paper Professor McNeill delivered from the platform of McMahon Hall at The Catholic University of America, when he represented the Catholic University of Ireland at a brilliant convocation in 1929. The substance of his thought was afterwards published in the volume containing the lectures he gave at New York University later that year.[17] This book, as well as the studies on the Irish penitentials, by the late Dr. T. P. Oakley,[18] are invaluable indications of the borrowings the Irish made through their saints and scholars, and of the contributions they made in turn to the law. The names of William of Drogheda and of Petrus Hibernicus will be mentioned again later in discussing the Bracton sources. If this background could be studied with reference to the legal ideas of Patrick D'Arcy and the Common Law, as written up in Professor McIlwain's *American Revolution,*[19] a missing chapter in the story of the Irish contribution to jurisprudence would become available.

Although the spiegelers did not reach their highest development until near the twelfth and thirteenth centuries, the sources from which they drew their material were for the most part produced from the sixth to the eleventh centuries, and may therefore be appropriately mentioned here. The "Mirror of the Justices" belongs to the history of the Common

[17] *Early Irish Laws and Institutions,* (London, 1935).

[18] "*English Penitential Disciplines in their Joint Influence,* (New York, 1923); "The Origin of the Irish Penitential Disciplines,"—*The Catholic Historical Review,* XIX (1933), 320-332.

[19] New York, 1924.

Law,[20] but the *Sachsenspiegel* is derived in part from Roman and Patristic concepts. The borrowings are so obvious that a Jewish scholar, Professor Guido Kisch, unfamiliar with the details of the Christian tradition, but recognizing the biblical allusions as familiar, has done a remarkable study recently, entitled *Sachsenspiegel and Bible*.[21] Were this volume to be supplemented by an analysis of the allusions to Christian doctrine in the *Sachsenspiegel*, a real contribution to the study of borrowings could not fail to result.

With the eleventh century, the revival of Roman Law studies at Ravenna and in Lombardy was followed by the work of Irnerius at Bologna, under the patronage of Matilda of Tuscany, friend and supporter of Hildebrand, Pope Gregory VII. Evidence of the vitality of Christian thought on law is to be found in the parallel development of Canon Law under Gratian during the following century. Spain is again important here, with the work of Saint Raymond of Peñafort, Master General of the Dominican Order, who urged Saint Thomas Aquinas to write his *Summa Contra Gentiles*. Saint Raymond's Decretals not only supplement the *Decretum Gratiani*, but they also point the way to the legal thinking of Alfonso X's time, when the *Siete Partidas* was in process of formation. When it is remembered that Saint Raymond, Saint Thomas Aquinas, and Bracton were all contemporaries, and that Alfonso was an uncle of Edward I, known as the English Justinian for his legal reforms, which follow closely upon Bracton's great work, the richness of the borrowings between law and Christian thought, between the continent and Britain, becomes especially significant.

In Henry Bracton, author of the greatest treatise ever written on the Common Law, the threads of Roman, Canon, and Common Law meet in that same century which marks the height of Christian intellectual development. Outside of his book, little is known about him. The earliest date at which

[20] American ed., Intro. by W. C. Robinson, Washington, D. C., 1903.

[21] Notre Dame, Ind., 1941.

his name appears in the documents thus far printed is 1240. Five years later he was a justice in eyre. From then until about 1267, he was active on the bench, on missions with his king, and as a churchman, being a member of the Cathedral chapters at Wells and at Exeter for some time before his death. Whether he was a priest or not is not certain, although likely. He must have been at least a deacon, and probably an archdeacon, at a time when archdeacons were closely associated with the law. Whether he studied or taught at Oxford is not established, although a tradition seems to have arisen associating his name with law studies there, as well as at London. Although he was primarily a public official in the king's service, no shadow of scandal seems to have touched him. On the contrary, all that we know of him suggests the able, learned, conscientious, hard-working judge, whose originality of mind delighted in deciding cases not only justly but scientifically, in accordance with the ablest thinking of his time,—his time being one of the greatest centuries our civilization has ever known. The one personal touch which has come down to us is dramatic in its pathos. He who was a master in the interpretation of legal instruments, left in his will a bequest for masses to be said for his soul in perpetuity. For three hundred years the trust was faithfully observed, weekly it appears, at a special altar in the Cathedral to which he was attached, marked by a tablet to his memory. With the so-called Reformation the tablet was whitewashed, and the trust wiped out, by order of a king whose predecessors he had faithfully served.

Great credit is due to the scholars of modern times who have made Bracton's work available to us. An edition of his book had been published in 1567 by Tottell, successor to Saint Thomas More's nephew, John Rastell, as the leading law publisher in London at the time that the first law library was being developed at Lincoln's Inn. That edition was reprinted later. It was the foundation of Coke's studies, by which Bracton's authority as a jurist was attested in the 17th cen-

tury. Nothing further seems to have been done until the 19th century, when six volumes of text and translation were issued in the Rolls Series, without, however, receiving the accolade of scholarship. Maitland's findings and tributes to Bracton have set aside all doubt about his claim to distinction. Indeed, much of Maitland's own claim to recognition is based upon his appreciation of Bracton's work.[22] Even more encouraging to legal scholars here in America is the fact that the first critical edition of Bracton's *De Legibus* has been the lifework of a professor at Yale University, Dr. George E. Woodbine.[23] As a result of the publication of these three volumes of text, a current literature is growing around Bracton, in our learned reviews, which is of the greatest significance in the study of borrowings between law and Christian thought.[24]

The sources upon which Bracton drew for the materials of his treatise disclose many borrowings whose identity is currently giving rise to intellectual controversy in the best classical tradition. Bracton's debt to Glanvill, his predecessor as an author in the twelfth century, is attested by Dr. Woodbine's own edition of that treatise.[25] Apparently it was scarcely

[22] *Bracton's Note Book*, (ed. by F. W. Maitland, 3 vols., London, 1887); *Select Passages from the Works of Bracton and Azo*, (ed. for the Selden Society by F. W. Maitland, London, 1895); Pollock and Maitland, *A History of English Law before the Time of Edward I* (2 vols., Cambridge, 1895).

[23] New Haven, Vol. I, 1915; II, 1922; III, 1940; IV, 1942.

[24] Kantorowicz, H., *Bractonian Problems*, (Glasgow, 1941); Richardson, H. G., "Azo, Drogheda and Bracton"—*English Historical Review*, LIX (1944). 33; Richardson, H. G., "Tancred, Raymond and Bracton"—*English Historical Review*, LIX (1944), 376-384; Schulz, F., "Bracton and Raymond de Penafort"—*Law Quarterly Review*, LXI (1945), 286-292; Schulz, F., "Critical Studies on Bracton's Treatise"—*Law Quarterly Review*, LIX (1943), 172-180; Schulz, F., "Bracton on Kingship"—*English Historical Review*, LX (1945), n. 237; Schulz, F., "A New Approach to Bracton"—*Seminar*, II (1944), 41-50; McIlwain, C. H., "The Present Status of the Problem of the Bracton Text"—*Harvard Law Review*, LVII (1943), 220-240.

[25] Glanvill, *De Legibus et Consuetudinibus Regni Angliae*, (ed. by George E. Woodbine, New Haven, 1932).

possible at times to discern Bracton's language in the conflicting manuscripts without having recourse to what Glanvill had said upon the same point. And previous to Glanvill, whose close connection with Hubert Walter, Archbishop of Canterbury, is not yet clearly understood, there may be found the long line of Norman and Saxon legal traditions, in which are to be found names as eminent as those of Stephen, Cardinal Langton, Thomas à Becket, Vacarius, Lanfranc, Anselm of Canterbury, and on back to Edward the Confessor and Alfred the Great, with their close affiliations with the See of Canterbury, with the Monastery at Bec, and with all the Christian traditions of Europe. If to the great work of Professor C. H. Haskins on the Normans in England, France, and Sicily,[26] be added studies in Saxon culture in England, Saxony, and the northern continental countries, by scholars like Dr. Tschan,[27] F. Libermann,[28] and others, and if all these be read with an eye to juridical development and the parallel history of Christian thinking, Bracton's place at the focal point is impressive.

First of all, Bracton was a jurist preeminent in the Anglo-American tradition. To this is to be ascribed his mastery of empirical methods in deciding cases. But he was also a churchman in an age outstanding for its contributions to the history of the Canon Law through Gratian, Peñafort, and Pope Gregory IX. Although no mention has yet been made of any debt to his ecclesiastical training for his knowledge of Canon Law, recent studies by Schulz and Richardson have begun to document his borrowings from that science, and to show his familiarity with and application of pertinent canonical principles in his analysis of facts and procedures. His knowledge and adaptation of Roman Law was the earliest of his borrowings to be recognized in modern times. Guterbök had pointed this out in the middle of the last century in Germany.[29] In-

[26] Haskins, C. H., *Norman Institutions,* (Cambridge, Mass., 1918); *The Renaissance of the Twelfth Century,* (Cambridge, Mass., 1927).

[27] Tschan, Francis J., *Saint Bernward of Hildesheim,* (Notre Dame, 1942).

[28] Libermann, F., *Die Gesetze der Angelsachsen,* (3 vols., Halle, 1903-16).

[29] Guterbök, K. E., *Bracton and His Relation to the Roman Law,* (tr. by B. Coxe, Philadelphia, 1866).

deed it was this feature which interested Maitland to such an extent that he identified many of Bracton's principles with Azo, and was puzzled with the variations in usage that he found in Bracton's treatment.[30] Recent studies of H. G. Richardson, F. Schulz, H. Kantorowicz, and others, have tended to correct the impression that Bracton's variations from Azo's text were due to ignorance, and to demonstrate instead that they were due to a knowledge of Roman Law not limited to Azo alone, and to an originality in adaptation of fundamental Roman Law principles to the novel problems of the Common Law.[31] Much yet remains to be done, but the tendency of the findings so far made in contemporary studies results in the increasing stature of Bracton's eminence as a jurist.

Among the avenues yet unexplored for the most part, but which promise new viewpoints from which to observe Bracton's achievements, are the works of William of Drogheda, Ricardus Anglicus, Thomas of Marlboro, and Petrus Hibernicus. The fact that these men were identified with England or Ireland, and that they were also identified with legal developments on the continent, would seem to suggest that they might be channels between those areas, through which the stimulation of Christian intellectual power reached Bracton in his youth. Wahrmund's editions of the books by William of Drogheda and Ricardus Anglicus[32] have been the means of making their work known to scholars like H. G. Richardson, who have put them to intelligent use. Petrus Hibernicus is less well known but equally deserving of study, since he took part in the revival of legal studies in Italy and is probably the same person who was the early teacher of Saint Thomas Aquinas at the University of Naples. Since Bracton in his

[30] *Selected Passages from the Works of Bracton and Azo,* (ed. for the Selden Society, by F. W. Maitland, London, 1895).

[31] See note 24, *supra.*

[32] William, de Drougheda, *Summa Aurea,* (ed. by L. Wahrmund, Innsbruck, 1914); Ricardus Anglicus, *Die Summa de Ordine Iudiciario,* (Innsbruck, 1915).

later years travelled extensively through England as a judge, and in Normandy with the king, it is reasonable to assume that a mind as alert as his would not only have made wide contacts but would have been drawn to well-known contemporaries with minds comparable to his own, of which there were many.

In the field of political science, authors like the Carlyles,[33] John Dickinson, [34] and A. H. Chroust,[35] have pointed to the significance of John of Salisbury and his writings on the state. As an Englishman teaching on the continent, his theories have special importance. Recently F. Schulz has indicated that he, too, was known to Bracton. Especially in Bracton's theory of kingship, which has been the object of special study recently by Schulz,[36] there is need to look back to John of Salisbury as one of the means by which the Christian doctrine of the relations between Church and State was formulated. Against this background, Sir John Fortescue, as brought out by S. B. Chrimes,[37] and Sir Edward Coke, as appraised in a recent article in the *American Bar Association Journal* by Ben Palmer,[38] are disclosed as able jurists who themselves borrowed Bracton's formulation of the principle worked out in the Christian tradition that the king is under God and the law.

Just as the pursuit of Bracton's theory of kingship discloses important borrowings from his predecessors in Christian

[33] Carlyle, R. W., and A. J., *A History of Medieval Political Theory in the West,* (5 vols., Edinburgh, 1903-1928).

[34] Dickinson, John, ed., *The Statesman's Book of John of Salisbury,* (New York, 1927).

[35] Chroust, A. H., "The Philosophy of Law from St. Augustine to St. Thomas Aquinas,"—*New Scholasticism,* XX (1946), 26-71.

[36] Schulz, F., "Bracton on Kingship,"—*English Historical Review,* LX (1945), n. 237.

[37] Chrimes, S. B., ed., *Sir John Forescue's De Laudibus Legum Anglie,* (Cambridge, 1942).

[38] Palmer, Ben W., "Edward Coke, Champion of Liberty,"—*American Bar Association Journal,* XXXII (1946), 135-139.

thought, so does an analysis of his theory of the sanction of law also show his debt to his contemporaries and forebears in juristic thinking. Striking variations in their definitions of law prove to be keys which open up differences characteristic of their whole system, on the part of Bracton, Aquinas, and Alexander of Hales. Alexander of Hales, an Englishman teaching at the University of Paris, had defined law as, *sanctio sancta, jubens honesta, prohibens contraria.*[39] Bracton had changed this to read, *sanctio justa, jubens honesta, prohibens contraria.*[40] Aquinas implicitly rejected the definition of his teacher, Alexander of Hales, which had been formulated out of a tradition which went back to Cicero, and had defined law instead as, *regula et mensura actuum, secundum quam inducitur aliquis ad agendum vel ab agendo retrahitur.*[41] By putting emphasis on human acts in their external manifestation, St. Thomas proved himself to be even more of a realist than the practical-minded Bracton, who placed emphasis less on the external act than on the sanction or approval of the act qualified by standards of justice. Without taking time to analyze here the consequences of these variations for legal philosophy, it will suffice to point out their significance for any adequate survey of jurisprudence.

Many other principles of legal thought which demonstrate Bracton's originality in adapting established doctrine to English cases could be pursued similarly with much profit. The relation of positive law to natural law or to morals, the problem of authority, the dispute as to whether law is discovered or created by human lawgivers, the mutability of law, the effect of law on human personality, these and comparable questions regarding the source, function, and purpose of law, have scarcely been touched upon. The beginnings have been made by the Carlyles, C. H. McIlwain,[42] and A. H. Chroust,

[39] *Summa,* III, q. 26, mem. 4.

[40] *De Legibus et Consuetudinibus Angliae,* f. 2.

[41] *Summa Theologica,* I-II, q. 90, a. 4.

[42] *The Growth of Political Thought in the West,* (New York, 1932).

from the standpoint of Christian philosophical traditions, and by Pollock and Maitland,[43] and Sir William Holdsworth,[44] principally from the Common Law standpoint, but they hardly suggest the riches which are waiting to reward the searcher for borrowings in this field. More of such studies will have to be made before a jurisprudence can be offered which will encompass the Common Law system adequately. If the Bracton literature now being produced be taken as a focal point where Roman, Canon, and Common Law meet Scholastic philosophical principles, a new insight into the realism implicit in the Common Law system will result which cannot fail to strengthen the law in its present struggle with current problems.

It ought perhaps to be pointed out that what is visioned here is not a repetition of the timeworn discussions of Church and State in their institutional character. That is primarily the subject-matter of political science and is not the concern of the philosophy of law as such. The customary way of thinking of Church and State is to recognize that in the early days of the Christian era, the Church was opposed to the worship of the Roman gods and of the emperors who were subject to deification. This was followed by an era when the Church lent its protection to the Roman State, as when Pope Leo I met Attila, the Hun, at the gates of the city and turned him back. The next development shows a politically powerful Church under Alexander III, which was able to hold tyrannical emperors and kings in check through the sanction of excommunication, a situation which in turn gave rise to the theoretical doctrine of the two swords, and which reached its height under Pope Boniface VIII and Philip the Fair. Following this came the break between Church and State, the rise of State churches in the place of the universal Church, and the rise of the doctrine of free churches in free States. The most

[43] *A History of English Law before the Time of Edward I,* (2 vols., Cambridge, 1895).

[44] *A History of English Law,* (3 ed., 10 vols., London, 1922-26).

recent development has been to identify any and all churches with the maintenance of the status quo as regards private property. The fallacy which marks this treatment of the Church and State as institutions always divided politically, is largely due to the inept concept of the Church which fails to distinguish differences in organization and doctrines, a concept far removed from the facts. Not until this false conceptualism is corrected by reference to reality in the true relationship between the universal Church and modern States, can there be developed successfully a new and dynamic world order in which both the spiritual and the physical needs of human beings can be adequately met.

The proposal offered in this paper is the rejection of these unhistorical and sterile methods, with their divisive characteristics, and the substitution in their stead of a new analysis of ideas as facts, and their treatment under law. If the resistance of the early Christians to the compulsions of the Roman state be viewed in this way, it will be observed that what the early Christians did was to resist the unwarranted totalitarianism of the State and to appeal to a natural right, a right based primarily on the natural law, that a man, merely because he is a human being, reserves a freedom of spirit apart from control by any State. In other words, there is a limit to physical coercion, beyond which a State cannot properly go regardless of its physical power. The Roman martyrs were the first opponents of the totalitarian State, as Cardinal Spellman recently pointed out.[45] Their protests were based upon a natural law, implicit to some extent in the *ius civile* and the pretorian law, as well as in the early Christianized codes, which, however, had to wait for the development of the Christian doctrine of personality and its incorporation in legal rules, before the right to liberty of spirit could be adequately protected. Whenever, during the centuries which followed, the tyranny of totalitarian pretensions on the part of political

[45] Address, on taking over his titular Church, SS. John and Paul, Rome, Feb. 25, 1946,—*New York Times*, Feb. 26, 1946, p. 2.

rulers reared its head, there have been men heroic in their resistance, appealing to the same principles of personality in the natural law and in Christian doctrine. The martyred Archbishop of Canterbury, Thomas à Becket, and the martyred Chancellor of England, Thomas More, are outstanding examples in the history of the Common Law. Similarity of ideas expressed in different centuries and in different legal systems evoke a similar response. If this common appeal to liberty under law against tyranny, whenever and wherever it occurs, be analyzed, a common foundation of principles and doctrine is observable, which demonstrates a unity in the human spirit which the divisive methods of political science tend to destroy. The proposal which this paper makes, relies upon the fact that a common ground exists throughout civilization, which law in its several traditional systems encounters. If the search for this common ground be pursued scientifically in the light of juristic principles empirically developed, a universality of legal understanding may be worked out which can supplant the divisions in rules and techniques of administration which plague us.

Since it is ideas which are borrowed, adopted, and given expression in different ways, the common ground advocated here is to be sought in the realm of ideas. The idea of human personality and its relation to law in Roman, Canon, and Common Law systems, has already served as an illustration of the method proposed. Another illustration is found in the idea of equality, developed under Christian inspiration, and borrowed for the law. Equality, not identity, of reward or punishment, in an after life, eventually became equality of opportunity to be heard in court, for each human being, and finally resulted in the motto, "Equal justice under law." Responsibility, which is something of a corollary to equality, involves the Christian doctrine of free will, a borrowing of great significance in the history of the criminal law and torts. In contracts, the doctrine of good faith, also borrowed from Christian teaching, is fundamental, where the trend has been

away from formalities and toward simple agreements. The development of the law of the case and the use of the case-method in teaching law, is another familiar feature, scarcely less important in Civil Law than in Common Law countries, which owes much to the distinctions based on individual differences which the Christian doctrine emphasized among the most important of realities. However desirable uniformity and consistency may be, there can be no doubt that they must be subordinated to the requirements of the individual case at times if equity and justice are to result. The canonical practice of granting dispensations in the discretion of the proper authority is an instance of similar treatment in a comparable legal system. Perhaps most important of all is the fundamental requirement of jurisdiction in all these systems, in order that a judgment may have validity. Recently in Common Law teaching, the concept of power has tended to supplant the concept of jurisdiction which was all important to Bracton. It is suggested, in accordance with the analysis of borrowings made here, that the concept of power be rejected for the more accurate principle, jurisdiction, in the study of the judicial process. Many other illustrations could be given of factual situations which are to be found common to the major legal systems and which have been borrowed from Christian thought throughout the centuries. If they can be adequately summarized in one paragraph, a recent noteworthy statement by Mr. Winston Churchill puts the idea, as it affects the Common Law, most effectively in a gracious tribute:

> "We must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, habeas corpus, trial by jury, and the English Common Law find their most famous expression in the American Declaration of Independence." [46]

[46] Address at Fulton, Missouri, March 5, 1946,—*New York Times*, March 6, 1946, p. 4.

International law grew up largely as a result of the breakdown of the universality of the organization of the Church in its relations with States. Yet the striking thing about international law is not the differences in the practices of the nations so much as the similarities in purpose which characterize their efforts to secure justice under law. To be sure, there is room for comparative studies, and need for greater borrowings in attaining greater liberty under law. Nevertheless, there have been sufficient borrowings throughout the centuries to yield much common ground. An analogy with the processes of conciliation is suggestive here. If the divisive factors can be passed over to the point where ever larger areas of common ground can be discovered, greater progress toward the rule of law among nations may result than may be the case with mere agreements on procedural techniques. A scientific analysis of borrowings of ideas may in this way underwrite the foundations upon which the international law of the future can be built.

The situation which confronts international law at the present time merits more than passing consideration from the standpoint taken in this paper. In a year which marks the 400th anniversary of Vitoria's death, nearly the 400th anniversary of Suarez' birth, and the 301st anniversary of Grotius' death, the beginnings of international law and the known borrowings which gave it vigorous birth to start with, could not be overlooked in any case. But at the present time, when international law is responding to new demands in a truly dynamic way, the universal character of its fundamental principles and not merely of its accepted techniques must be recognized if it is to claim and to hold the world-wide confidence being placed in it. If the divisive factors of national differences be thought of rather than the common ground of borrowings in ideas, failure rather than success can again mark its course. Nowhere is the necessity for the universality of a few fundamental principles common to all peoples (because based upon human nature) more obvious than in the field of international law.

By way of recapitulation of the thesis of this paper, it may be pointed out that our legal thinking has in recent centuries been done in isolation behind national frontiers. Roman and Civil lawyers have known little of Common Law principles and few common lawyers have cared to study the civilian system. Indeed, legal education has been isolated, not only through concentration on a particular legal system, but also through lack of contact with the rest of the university and academic world in which a law school operates. The narrowly technical courses appropriate for a practical training in the analysis of legal rules leave neither time nor inclination for relating them to the broad culture which is traditionally known as a liberal education. This must first be corrected before a sound international viewpoint can be maintained. Otherwise a narrow nationalism, which stresses differences instead of universal principles held in common, will be likely to increase. It is proposed here that a systematic study of borrowings in the different legal systems and in Christian thought, from the patristic era to modern times,—a study pursued as consistently as, for example, has marked the analysis of interpolations in correcting our knowledge of Roman law,—be undertaken in order to revise the unhistorical assumptions which, until now, have characterized much of our isolated legal thinking. If this be done, some hope for a juster world order may arise in which lawyers may again take the rightful place in leadership which Ambrose and Jerome, Bracton and Thomas More, Vitoria and Suarez, to name but a few, have shown them how to do.

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Digests

CHAPTER V

Of *The Competence of Church and State Over Marriage—Disputed Points* *

LICENSE

In every State and Territory of the United States there exist laws which require that those who wish to contract marriage obtain from the competent civil official a document showing that the civil authority has been notified of the intended marriage and attesting that so far as civil laws are concerned there appears to be no obstacle to the marriage, and stating that it is lawful for a competent minister to assist at the wedding. In most of these States this document is designated a marriage license; but in some it is termed simply a certificate. In some of the States the license is required only for the lawfulness, but in others for the validity of the marriage.

Insofar as the document itself is concerned, if it is to be called a license, then the term must be understood in the broad sense. The right that man has to marry comes to him from the natural law and not through the concession of any human authority. If, moreover, the license be regarded as a declaration that the parties are free of any civil impediments and may therefore contract marriage, it can be understood as applying in that sense only to the unbaptized, who alone are subject to such civil impediments. *De facto,* however, the license does not prove that there is no impediment to the marriage. It merely shows that, so far as the civil laws are concerned, it appears to the civil authority that these parties are capable of contracting marriage legitimately.[1]

Only the Church can establish impediments for Christian marriage and consequently the baptized are not bound by these civil impediments. For the baptized, then, the license itself can at most be regarded only as the first step in the civil registration of the mar-

* Goldsmith, J. William, The Catholic University of America Canon Law Series, n. 197 (Washington, D. C.; The Catholic University of America Press, 1944).

[1] Alford, *Jus Matrimoniale Comparatum* (Romae: Anonima Libraria Cattolica Italiana, 1938), n. 284.

riage. It is fully within the competence of the State to require registration of all marriages, even those of the baptized, in order that the purely civil effects that follow from the marital contract may receive legal sanction. This registration of the marriage is usually completed through the filing with the proper civil official of a formal certification that is signed by the officiating minister and which testifies that the marriage has actually been contracted. And it is further within the power of the civil authority to inflict penalties upon the parties for non-observance of these solemnites. But these penalties may never extend to the point of declaring that the marriage will be illicit or invalid in civil law if such registration has not been made. Nor has the State a right to punish a priest for his failure to observe these prescriptions of the civil law; to do so would be to interfere with the exercise of his ecclesiastical ministry, an infringement on the independence of the Church. In this country, however, where in many of the States there actually do exist penal sanctions in these matters directed against the minister as well as against the parties, prudence would dictate that priests regard compliance with such regulations as a conscientious duty, if not to protect themselves, at least to prevent serious harm to the parties and their children.

Furthermore, in denying legal recognition of the effects of marriage to those parties who have not complied with the civil laws on registration, the State exceeds its authority when it refuses to recognize the legitimacy of the children born of a marriage between two Christians and (according to the common and more probable opinion) of a marriage between a baptized person and an unbaptized person. For, the legitimacy of children is not one of the merely civil effects of marriage, but rather is one of the effects that is inseparable from the substance of the contract, and consequently in the given case lies within the province of the authority of the Church. But in the event of conflict of State legislation on this matter, the parties should attempt, insofar as this be possible, to see to it that the legitimacy of the children be established in the civil forum also; this obligation arises not from the force of the civil laws themselves, but rather from a duty in charity to avoid the consequent grave harm to their children.

Before the issuance of the marriage license itself, certain antecedent requirements are prescribed by the law of some States. One

such prerequisite is the declaration of intention that is to be made by the parties. In a very general way this requirement may be said to correspond with the publication of the banns in Church law. The object of this declaration is to restrain the contracting parties from hasty and inadvisable marriages and to provide some time for investigation as to the capacity of the parties to marry. To that end, the regulation demands that there be a certain interval of time between the declaration of intention and the obtaining of the license, or between the obtaining of the license and the actual contracting of the marriage.[2]

This interval of time varies in the respective States. Some permit the issuing of a license immediately upon the notification of the intention to marry, and also the subsequent marriage without further delay; among other States, the interval of time ranges in length from one to thirty days. Among those States which require longer intervals, there is usually some provision for exceptions to be made under certain circumstances, *e.g.,* when there exists a good or reasonable cause for immediate marriage. These causes are frequently specified in the laws of the several States. These various regulations governing the declaration of intention of the parties are in themselves just and reasonable, and hence unbaptized subjects of the State who wish to contract marriage are bound to observe them. It is another matter for the baptized subjects of the State, because these particular marriage laws have no binding force in themselves for citizens who are at the same time subjects of the Church, except and only insofar as they are concerned with the purely civil effects of marriage. To that extent and to the extent that these regulations are just and valid (*i.e.,* do not interfere with the higher rights of the Church), they are in themselves also binding upon the baptized subjects of the States.

When, however, the scope of this legislation extends beyond the merely civil effects and touches upon either the substance itself or upon the inseparable effects of the marital bond, the obligation arising from the civil law to observe these regulations is no longer binding upon Christians. But in such an eventuality—since the connection between these antecedent requirements and the issuance of the license itself is so close—the same principle that was employed above may be applied here. Consequently, for the purpose of avoiding serious harm to themselves or their children, the Chris-

[2] Alford, *op. cit.,* section 27, *passim.*

tian parties (or, in the case of a mixed marriage, the Christian and the infidel) may be said to be bound by a precept of charity to comply with these regulations; but, obviously, their failure to do so would have no effect upon the validity or the lawfulness of their marriage.

Another necessary condition for the obtaining of a civil license for marriage is the approbation of parents which is required if the parties intending to be married have not attained the legal age for marriage according to the civil statutes. This prescription is not concerned with the impediment of age; it is directed rather towards the period between the cessation of that impediment and the attaining of the age of legal majority.[3] It is simply a restriction on the freedom of minors to marry, and it decrees that the ones thus restricted must obtain the consent of their parents or guardian before they will be granted a license to marry. There is little practical conflict between the civil and canonical legislation on this point, for the requirements of the various States in this regard usually affect only the question of the lawfulness of the marriage which is contracted in contravention of them. In the event, however, that this civil regulation should be extended to touch the bond itself, it would not affect the validity of a Christian marriage contracted in accordance with the laws of the Church, even though the parental consent had not been obtained. For, in Canon Law the consent of the parents of minors is required only for the lawfulness of the marriage.

HEALTH REQUIREMENTS

Of the various civil prerequisites for marriage perhaps the most important is the one derived from the so-called eugenic legislation, by which persons suffering from venereal infection are forbidden to marry as long as they have the disease. This regulation may well be, and often is, treated along with other civil impediments under the caption "impediment of disease". However, the usual procedure of this eugenic legislation is to require that those who intend to be married secure from a physician a written statement certifying that they are free from venereal diseases. This certificate must be presented to the proper civil official before the parties can obtain a marriage license.

[3] Alford, *op. cit.*, n. 301.

These laws are variously designated as eugenic laws or social disease laws or blood-test laws. Like most of the other civil laws on marriage in this country, they vary widely among the States. Here, the particular importance of these laws arises from the practical conflict of jurisdiction they present—a conflict that comes from the form of the legislation and the manner of its application rather than from the sociological aims and purposes that underlie them. Now the civil authority may not prescribe a medical examination for baptized persons about to be married in such wise, that, if this condition is not fulfilled, marriage is forbidden to them. By so doing the State would be establishing an impediment, and this the State is entirely incompetent to do for such marriages.

May not the State, by virtue of its competence over the merely civil effects of marriage and for reasons of the common good, and particularly for the purpose of promoting and insuring the health of its citizens, enact such restrictions? Certainly it must be said that if the civil authorities concerned themselves with the merely natural aspects of the matter—for example, by instructing the citizens about the nature and virulence of social diseases and by providing remedies for them—the State would be acting within its proper sphere. But to go beyond this in any way so as to touch upon the supernatural marital bond would be to exceed the limits of its authority with respect to the civil effects. Hence, to decree that if the medical certificate is not obtained, the marriage either will not be civilly recognized or will be deprived of some of its essential and intrinsic effects, or even to impose upon the baptized this medical examination under penalty of denial of the merely civil effects, would be equivalent to the establishment, at least indirectly, of an impediment. This is not within the competence of the State.

It is admitted that the State would act entirely within its proper sphere of authority if it segregated diseased persons until they can be cured. Yet it does not follow that it also lies within the power of the State to restrain them from marrying without such segregation. It is one thing for persons to be rendered incapable of marrying as a consequence of the lawful exercise of proper civil authority; for then the act of marrying on the part of such persons would become illicit only accidentally and by reason of some extrinsic circumstance, but not essentially so or in view of the act itself independently of other factors. But it is quite another matter for such

persons to be prohibited from marrying by direct legislative action which touches upon the marriage contract itself; for it is wrong to deduce from the above accidental and extrinsic right of the State that the latter can make regulations for a supernatural and sacramental thing, when only by reason of extrinsic circumstances its power extends to that sacred thing insofar as it is sacred.

Does the State have the right to enact such laws on the ground of its power to enforce the natural law? May the State use its legislative and coercive powers with regard to what is prescribed or forbidden by the natural law concerning marriage insofar as violations of that law are harmful to the good of society? In view of the highly infectious character of social disease, may an infected person marry an uninfected one, exposing the latter through cohabitation to infection? Is the natural right to marry of such a character that it is to be left untrammeled even to the extent of injuring others?

Donnelly says that in view of the circumstances the State may use its authority even over baptized persons to prevent such injury from being inflicted.[4] But his view presupposes that it is against the natural law for a person suffering from venereal infection to marry. But, while such a moral principle is not entirely lacking in support, the majority of theologians teaches that, given the requisite justifying causes, the natural law does not forbid the marriage of a person afflicted with a communicable social disease. Granted the power of the State to enforce the natural law for the good of civil society, it is nevertheless necessary to distinguish between the exercise of that power over the baptized and its exercise over the unbaptized. For the baptized, it may be admitted that the civil authority can under certain circumstances and for the public good enforce the natural law when it requires one to postpone marriage for a time, so long as this power is restricted to matters prescribed or forbidden by the natural law according to the teachings of the Catholic Church. But it must be pointed out that the Church has nowhere declared that the natural law forbids the marriage of persons afflicted with social diseases. On the contrary, for centuries Catholic theologians have been teaching that marriage and the use of marriage are not prohibited by the natural law when one party is afflicted with a venereal disease, provided that the other

[4] Cf. Donnelly and Connell, "Compulsory Blood Tests before Marriage"—*The Ecclesiastical Review* CI (1939), 9-30.

party is informed of the presence of the disease and there is a proportionately justifying cause for the marriage or its use, such as the avoidance of incontinence. Furthermore it seems unlikely that the Church will declare it to be against the natural law. For, if one consider the substance of marriage with respect to the consent of the parties and the transfer of mutual conjugal rights, in what way could the marriage of such persons be said to be contrary to the natural law by reason of their affliction? It is rather to be assumed that it would be against the natural law to deprive them of their innate right to contract marriage. The Church, however, could establish, within certain limits, an absolute impediment that would take away from such a diseased person his innate right to marry. But it is only quite exceptionally and for the gravest reasons that the Church could make an absolute impediment by which a determinate class of persons would be forbidden to marry, or even through an invalidating law be rendered incapable of marrying. Only two such grave reasons seem to exist: the necessity of defending the life and the rights of a third person, and the necessity of defending and vindicating the common good of society. The first reason exists in the case of a person afflicted with a communicable social disease if the Church for the protection of the spouse should forbid the one so affected to marry so long as the danger of contagion is present.

Only the Church can declare to what extent the natural law prohibits or invalidates marriages of the baptized. If the State is to exercise over the baptized its power of enforcing the natural law, the exercise of that power must be limited to matters prescribed or forbidden by the natural law according to the teachings of the Church. Its law would have to read: "Syphilitics may not marry unless the other party is forewarned and there is a justifying cause for the marriage, the Catholic Church being the judge in this matter." The same principle is applicable in the event that the civil law is framed in such a manner as to delay marriage until a cure can be effected. The State can exercise such a power in the case of baptized persons only by putting itself in agreement with the competent authority, that is, the Church.

What is to be said of the right of the State to make these health laws for its unbaptized subjects? It is the Church's interpretation of the natural law that ultimately governs this right also. It must

be asserted that it is not certain that it is against the natural law for a person afflicted with a social disease to marry. Hence, it can not be urged that the State by passing health laws is merely enforcing the obligation already incumbent on the person under the natural law. But the State for its unbaptized subjects does have the power—subject to the same qualifications and restrictions as is the power of the Church in this matter—to deprive a person suffering from venereal infection of that innate right to marry which he is recognized to have under the natural law. This deprivation can be effected only for the protection of the spouse or for the common good, and for such time as may be required to eliminate the danger of contagion.

But, from a purely practical point of view, even a law framed in this manner would present great difficulties in its application due to the ignorance of secular jurists of the fine distinctions based on the relation between natural law, divine law, and positive law. Perhaps the best solution is to be found in a law which would require couples intending to be married to submit to a medical examination and each to be informed of the other's condition. But let the law stop with that and require nothing further; it should not forbid them to marry if they still wish to do so despite the presence of a social disease.

NONAGE

Among the civil impediments is found that of nonage. In civil law it is generally recognized that persons wishing to be married must be capable to giving intelligent matrimonial consent. At common law the age at which they are deemed capable of giving such consent is fourteen years for males and twelve years for females, but in most of the States this age of consent has been raised by statute. Marriages contracted after the age of consent has been attained are generally regarded as valid, unless the permission of the parents (in the case of minors) is required under penalty of nullity.

Marriages contracted below the age of consent but after the age of seven years are variously termed as voidable, inchoate or imperfect.[5] These inchoate marriages can, according to civil law, be

[5] Alford, *op. cit.*, n. 87.

declared void at the option either of the parties or of their parents, or they can be validated by cohabitation of the parties after the age of consent is reached. Marriages contracted before the age of seven are absolutely void in civil law. These regulations, like those of Canon Law, are found radically in the natural law, which is concerned directly with the capacity to give true matrimonial consent, and only indirectly with the age. Such laws of the State are binding on the unbaptized; and their marriages contracted in contravention of such an invalidating civil impediment are invalid. But for the baptized the Church will not regard their marriages as valid unless the male has completed the sixteenth year and the female the fourteenth year of age.

If the civil law require a higher age than that established by the Church, then, for the baptized, a compliance with such civil regulations can not be demanded for the validity of their marriages. This would be true, too, according to the opinion of the majority of canonists, of marriages contracted between an infidel and a Christian, if both the Christian and the infidel had attained the requisite canonical age, but the latter had not yet reached the requisite civil age of consent. The Church, however, urges pastors to dissuade the young from marrying before the age at which marriage is usually and customarily contracted in their respective countries. But this obviously is a merely directive norm which touches neither upon the validity nor necessarily upon the lawfulness of a contrary act on the part of the persons wishing to marry.

It is important to note one fundamental difference in the legislation of the Church and that of the State with regard to the marriages of those who are over seven years of age, but who have not yet attained the canonical or civil age of consent. Such marriages can under the civil law be validated by simple cohabitation of the parties as husband and wife. Under Canon Law, if the parties married before attaining the canonical age, the impediment indeed ceases by the lapse of time, but the marriage does not thereby become valid; the parties must renew their consent.

IMPOTENCE

Impotence is generally recognized in civil law either an an impediment which renders marriage void or voidable, or as grounds for a civil divorce *a vinculo*. The incapacity that it contemplates must exist at the time of the marriage and must be an incapacity

to copulate; the element of fecundity does not enter into consideration. By common law, impotence renders a marriage voidable; and in some States the impediment has that effect by statute. In one or two States this impediment renders a marriage absolutely void, so that a judicial process for a declaration of the nullity of the marriage is not strictly required. In most States, antecedent and incurable impotence constitutes grounds for civil divorce, but is not regarded as a civil impediment.[6]

Impotence is an impediment deriving from the natural law itself, since it militates against the object of the matrimonial consent and contravenes even the primary end of marriage. This is actually stated in Canon 1068, § 1. The canonical legislation then is not merely ecclesiastical law, but rather a determination and definition of the natural law.

Since the Church alone is competent to declare authentically in what cases the divine law forbids or nullifies a marriage, the right to specify this impediment does not belong to the civil law. The State indeed has the power to enforce the natural law as such, or as authentically declared by the Church, so far as its unbaptized subjects are concerned. But insofar as the civil authority attempts to introduce variations or changes into the determination of the natural law, such legislation is invalid because it lies outside the sphere of the secular competence.

In those States, therefore, where impotence is held to constitute grounds for divorce, the legislation in that respect is invalid. Apart from any question of the right of the State to dissolve the marriage bond, it is evident that the very term "divorce" presupposes a valid marriage. But if one of the parties was impotent, then there could not have been a valid marriage. Again, the term voidable not only signifies a marriage for which a declaration of nullity may be obtained (provided that the nullity be established, for the marriage enjoys the favor of law and is presumed to be valid), but also implies that the nullity of the marriage may be healed. This opens the way to false interpretations with regard to the impediment of impotence, for in some States there are established time limits within which the validity of the marriage must be attacked. Moreover, in some States not only is the impotent party excluded from bringing judicial action, but, further, the party who is free of the

[6] Alford, *op. cit.*, n. 100.

impediment may by condonation lose the right to have the marriage declared null. These notions are all contrary to the absolute nullity that results from the impediment of impotence.

PRIOR MARRIAGE

In theory the civil impediment of prior marriage is the same as the impediment of *ligamen* in Canon Law, for on the surface at least, it is recognized in civil law that a valid and undissolved prior marriage of either party renders a subsequent marriage absolutely void *ab initio*, and that bigamy is a crime punishable by law. But in fact and in practice the civil jurisprudence in regard to this impediment is vastly different from the canonical legislation. The very foundation of this difference lies in the failure of the State to admit the jurisdiction of the Church over marriage within its proper province of competence. For that reason a marriage declared null by competent ecclesiastical authority is not regarded as null by civil law in virtue of that declaration; and a person who had obtained such a declaration and then attempted a second marriage without a divorce or a declaration of nullity granted by the civil authority would be regarded as a bigamist. On the other hand, a person who had obtained a divorce and thereupon contracted a second marriage despite the fact that the first bond was valid under Church law would not commit bigamy under the civil law.

The civil impediment of prior marriage loses most of its real force and value because of the fact that by civil law a perfectly valid marriage, though it is ratified and consummated, can be dissolved by a civil divorce. Hence the State denounces polygamy as contrary to the fundamental law of all Christian nations and punishes it as a great crime; but in practice, because it assumes the power of dissolving that which is indissoluble, it renders polygamy legitimate by its own laws.[7]

The impediment itself, in addition to being included among the diriment impediments in the Code of Canon Law, is an impediment of the natural law and of the divine positive law, for it is rooted in the essential properties of marriage (unity and indissolubility), and it flows from the divine prohibition of polygamous unions. As a declaration of divine law, therefore, this canonical enactment binds the unbaptized as well as the baptized.

[7] Alford, *op. cit.*, n. 114; *ibid.*, section 10.

CONSANGUINITY

The impediment of consanguinity as found in the civil law offers several difficulties because of the variations among the laws of the States. Under the view of theologians marriage between blood relatives in the first degree of the direct line is in the opinion of all certainly invalid by the natural law. Marriage between blood relatives in the other degrees of the direct line in the more tenable opinion is likewise considered invalid by the natural law so that the invalidity of such a marriage derives more probably from the natural law than from merely human legislation. Marriage between blood relatives in the first degree of the collateral line is in the more tenable opinion also regarded as invalid in consequence of the secondary precepts of the natural law; marriage between blood relatives in other degrees of the collateral line is universally considered as certainly not invalid in consequence of any divine law, natural or positive.

Thus the impediment in the collateral line with regard to degrees beyond the first (but only up to and including the third) is certainly a merely ecclesiastical impediment and therefore binding only on the baptized. For the baptized, moreover, the impediment of consanguinity renders null a marriage within any of the degrees mentioned unless a dispensation be obtained for those degrees of relationship over which the Church has the power to dispense. Moreover, if Christians obtain from the competent ecclesiastical authority a dispensation from the impediment within a certain degree, their marriage will be valid notwithstanding a civil prohibition against marriage in that degree. For the unbaptized the legislation of their respective States is valid and binding. As a result, in the absence of any civil provision in the matter, the only degree of consanguinity within which the marriage of infidels would be certainly invalid is the first degree of the direct line, for it is not incontestably certain that marriages within any other degrees, whether direct or indirect, is rendered invalid by the law of nature.

AFFINITY

Since the promulgation of the Code the civil and the canonical legislation on the impediment of affinity have generally and theoretically been in harmony in decreeing that the impediment arises

only from a valid marriage and not from mere carnal intercourse.[8] In Church law the impediment is recognized as being of its nature perpetual, so that it does not cease by the death of a spouse, or by the dissolution through Apostolic dispensation of the bond of a ratified and non-consummated marriage, or by the dissolution of the latter through solemn religious profession. In civil law, although this quality of permanence is generally recognized, so that the impediment remains after the dissolution of the bond by the death of one of the parties or after the obtaining of a civil divorce, yet in many States the established jurisprudence does not seem to admit of this permanence.[9] Obviously the practical effect of such an interpretation is that those States have no impediment of affinity.

In Canon Law it seems that the impediment arises only from a ratified marriage and not from a merely legitimate marriage. On the other hand, in civil law the impediment arises from any valid marriage, that is valid in the eyes of the civil law. But at all events the canonical impediment is generally held by theologians and canonists to be an impediment of the ecclesiastical law alone and in no degree and in neither line to be derived from the natural or divine positive law. If then, there be no impediment established by civil law, marriage among unbaptized persons related by affinity will be valid; but if an unbaptized person wished to marry a baptized person related to him by affinity as a result of a previous ratified marriage, then the unbaptized person would be indirectly subject to the ecclesiastical impediment of affinity.

The State is competent to legislate for infidels with regard to this impediment, and the marriages of these persons are subject to any invalidating effects of the civil provisions. Certainly the State has no right to make such laws for its baptized subjects.

LEGAL RELATIONSHIP

Of all the matrimonial impediments the one arising from legal relationship presents the least conflict of jurisdiction between the Church and the State. The Church has canonized the civil regulations on this matter by decreeing that if by civil law legal relationship, arising from adoption, renders marriage either unlawful or invalid, the marriage is likewise either unlawful or invalid in Canon

[8] Alford, *op. cit.*, n. 151.

[9] Alford, *op. cit.*, section 12.

Law. This impediment does not exist in the United States but is established as a diriment impediment in the civil code of the Territory of Puerto Rico.[10]

It should be remarked that the constituent elements of adoption, as well as the existence, scope, nature, and duration of the impediment of legal relationship, are to be determined from the civil law. But in matrimonial causes of the baptized the interpretation of the impediment in relation to a particular marriage would obviously pertain to the ecclesiastical tribunal. And, finally, it should be noted that the impediment of legal relationship, even though based on the civil dispositions in those places where it exists, is formally a canonical impediment for the baptized. Consequently for the latter a dispensation would have to be obtained from the Church and not from the State; and conversely a dispensation granted by the civil authority would not remove the impediment.

INSANITY

Among the matrimonial impediments may be considered that of insanity, although, strictly regarded, the lack of reason as an obstacle to marriage is based on a defect of consent and may therefore be termed an impediment only in a broad sense. The civil legislation varies among the various States, but by the common law insanity is regarded an impediment that renders marriage absolutely void. To that extent, the civil law is, in a general way, in harmony with the canonical provisions in the matter. The Code, however, does not contain a specific canon in relation to insanity. The principle governing such cases is: Marriage is constituted by the legitimately manifested consent of persons who are able by law to marry; and this consent can not be supplied by any human power.

Now it is recognized that one of the obstacles to valid consent is insanity. But to be an obstacle in the sense of a diriment impediment the insanity must, at the moment of the celebration of the marriage, be such as to leave the contracting party without sufficient use of reason for the understanding of the substance of marriage. Hence, considered purely from the viewpoint of its absolute invalidating effect, it does not matter whether the insanity is habitual or temporary, total or partial; what is important is whether the party was deprived of sufficient use of reason at the very moment

[10] Alford, *op. cit.*, n. 163.

of marriage. Certainly, however, from the practical point of view attention must be given to these elements of permanence and extent, for in relation to the habitually insane the presumption is against a lucid interval; whereas, if the lack of reason is not continuous, marriage contracted at a supposed lucid interval would enjoy the favor of the law. The exact influence of the mental disability on the human act requisite to be placed in the actual contracting of marriage must be determined in particular cases. To aid in this determination canonists have elaborated certain general principles regarding various states of insanity and their effects on the judgment and freedom which are essential to the very nature of the matrimonial contract.

The Church, of course, does not encourage marriage on the part of a person afflicted with a mental disability, but she insists that the right to marry which such a person has from the natural law can not be denied him absolutely; and if he contracts marriage at a moment when he is capable of giving valid matrimonial consent his marriage must be recognized as valid. Therefore, only those persons who are devoid of the use of reason, either habitually or actually (at the time of entering into the marital contract), can be said to be incapacitated by the natural law itself for the contracting of marriage. These fundamental concepts must be borne in mind in order rightly to evaluate the civil prescription in regard to insanity as an impediment to marriage.

The State, as has already been noted, is competent to legislate for the unbaptized in such matters, and as long as its laws are not contrary to the norm of the natural law they are valid and binding on the unbaptized. But the tendency in civil jurisprudence seems to be in the direction of widening the scope of this impediment in such a way as to forbid marriage to the feeble-minded, and that only for purely eugenic reasons, *i. e.*, to prevent the generation of feeble-minded offspring. To this end marriage is either forbidden to such persons absolutely, or it is allowed them only if they first undergo an operation for sterilization. Regulations of such a kind obviously militate against the natural law itself, and certainly can not find legitimate sanction.

Civil legislation in regard to insanity has followed a false course in another direction by providing that a civil divorce may be obtained on the ground of insanity—whether it existed at the time of the marriage or whether it developed at a later date. If the

party was really insane at the time of the marriage, there could have been no bond to be dissolved by divorce; if the insanity developed later, it has no effect on the matrimonial contract itself—which the State has no power to dissolve.

DRUNKENNESS

Drunkenness is likewise established in civil law as capable of having an invalidating effect on marriage. In Canon Law it is not reckoned among the impediments to marriage, but is usually treated by canonists among the other causes of defect of consent based on the want of sufficient reason. When the drunkenness is such as to take away all use of reason it is equivalent to temporary insanity. It then renders the marriage invalid because the drunken person is incapable of giving a valid consent. But if the drunkenness is incomplete or only partial, then it does not render the marriage invalid.

In this country, the civil jurisprudence recognizes these same principles in that the marriage is judged to be valid or invalid according as the drunken party had or had not the use of sufficient reason at the time the marriage was contracted. In some few States, moreover, habitual drunkenness is an impedient impediment, and it is forbidden to grant a license to a habitual drunkard even though he be sober at the time. Inasmuch as these laws contemplate the avoidance of harm to the family and to society, as affecting the unbaptized they can rightfully be sanctioned in their enactment. But the State could not attach to them an invalidating effect, for such a disposition of the civil law would be contrary to the natural law.

HABITUAL CRIME

Of a nature similar to the laws forbidding the marriage of habitual drunkards are the civil provisions of a few States which prohibit the marriage of habitual criminals. For these laws it may also be said that, as affecting the unbaptized and as prohibitive, they are prudent and proper because they are intended to prevent harm to the family or protect the common good. But certainly it would be wrong, in the case of either habitual drunkards or habitual criminals, to go to the extent of establishing compulsory sterili-

zation as a means of carrying out these civil prescriptions. Such a procedure is based not on any conceivable principle of just punishment for a crime committed, but solely on eugenic considerations which have usurped the rightful place of the aims of a higher order. The Holy Office on March 21, 1931, held the eugenic theory to be false and condemned it,[11] referring to the encyclical of Pius XI, *Casti connubii,* of December 31, 1930.[12]

EPILEPSY

The question of disease as a civil impediment has already been discussed. A word is appropriate here as to epilepsy, since many States have either made it an impediment to marriage, or permit epileptics to marry but only if the woman is over forty-five years of age or if the afflicted party will submit to an operation for sterilization. The eugenic tendencies in the two latter prescriptions are evident. Such legislation can not be justified. To establish epilepsy as an absolute impediment would be to forbid marriage absolutely to persons fit by the natural law to contract marriage. This, as already indicated in the discussion of health laws, the State can not do.

MISCEGENATION

An often discussed question in regard to marriage is that of the advisability of marriage between members of different races. From the biological standpoint, it is asserted by some that a mixture of races produces inferior offspring; by others it is claimed that no solid physiological proof can be brought to support that theory. From the sociological standpoint, it is maintained by some that the common good of society requires that interracial marriages be discouraged because of the social dissensions and difficulties arising from them; by others it is held that such a view is based on specious reasoning and that the real purpose behind these attempts to forbid such marriages is to protect the social, political, and economic supremacy of one race. Whatever be the merit of these various opinions, it is a fact that in more than half the States of this country there are in force laws which forbid marriage between a person of the Caucasian race and a person of non-Caucasian origin.

[11] *AAS,* XXIII (1931), 118.

[12] *AAS,* XXII (1930) 539.

With regard to the unbaptized the State has the power to establish impediments for them when they marry among themselves. Hence there seems to be no reason which bars the State from setting up racial difference as a diriment impediment for the marriage of her infidel subjects. By such laws the civil authority is not going contrary to the natural law, for they do not take away altogether the right of the person to marry, but rather place a certain restriction on that right. Nau,[13] on the contrary, maintains that the justice and reasonableness of these laws may be questioned. The restriction is justified by some authors on the ground that the prevailing prejudice ostracizes the parties who enter upon an interracial marriage, and that this social ostracism places a strain on the family relations by jeopardizing the mutual love and respect of the spouses.

There is little reference to the question in the writings of Catholic theologians in this country. Gilligan [14] (who is among those who justify this restriction) draws an argument *a pari* from the attitude of older theologians towards marriage between a noble and a peasant. It was admitted, he says, that there was nothing inherently wrong in such marriages, but because of the grave probability of quarrels, and also because of the shame of the relatives, theologians taught that such a marriage was illicit and in some cases sinful. Gilligan is of the opinion that the presumption of an interracial marriage coming to an unhappy end in this country is so strong that young people would sin against prudence if they deliberately entered into such a union. However, it is not certain that these marriages would be sinful. Hence, as regards the baptized (and particularly Catholics), although the civil prohibition against interracial marriages would not as a law be binding on them, it must be said that prudence and the good of the couples themselves would induce a pastor to dissuade in most cases such interracial marriages. However, this would not justify a pastor to refuse to assist at such a Catholic marriage.

[13] Nau, *Manual on the Marriage Laws of the Code of Canon Law*, (2 ed., New York and Cincinnati: Pustet, 1941), n. 9.

[14] "The Color Line Considered Morally"—*The Ecclesiastical Review*, LXXXI (1929), 482.

ERROR

The very nature of the marriage contract as involving a transfer of mutual rights demands that there be expressed the marital consent of two determinate persons. Hence a substantial error in regard to the person of a spouse vitiates the consent and renders the marriage invalid by the natural law itself. By the natural law, too, error in regard to the quality of a person when it is equivalent to substantial error about the very person likewise renders marriage null because of the lack of mutual consent. These classes of error, since they place an obstacle to the matrimonial consent required by the law of nature, render null the marriages not only of the baptized but also of the unbaptized (even apart from the provisions of the civil law). In this country, although only one State has established by law that error concerning the person nullifies marriage, nevertheless on general principles regarding consent the diriment effects of such error are everywhere recognized.

In the law of the Church it is decreed that error in regard to the quality of a person invalidates the marriage contract only if it be an error about the servile condition of the person. Now this disposition of the canons is of ecclesiastical law only, and hence is binding only on the baptized. In civil law there exist numerous provisions concerning error of quality, and most of these are determined by the principles governing fraud as it affects the marriage contract. Generally, these civil regulations are broader than the discipline of Canon Law, but it does not seem that they are contrary to the natural law.

Although in fact the Church has not wished to do so, nevertheless she could further extend the diriment effect of error of quality as an impediment of ecclesiastical law. Hence it seems that there are not lacking reasons which enable the State reasonably to declare marriages of infidels entered into under the influence of substantial fraud to be invalid, provided that such laws are reasonable and proper and do not attempt to render the matrimonial contract merely rescindible. But wherever these laws are so lax as to admit of all kinds of abuse they lose that necessary foundation of reasonableness and propriety and can not be sanctioned; and wherever they provide that marriage contracted under the influence of fraud is rescindible, they are contrary to divine law.

VIOLENCE AND FEAR

A consideration of violence and fear is next in order. The Code states that a marriage is null if contracted because of violence or grave fear arising from an extrinsic source and unjustly inflicted, to free himself from which the person is compelled to choose marriage; but no other fear, even though it be the cause of the contract, entails the nullity of marriage. It is certain that, if the inflicted physical violence be so strong or the fear induced be so grave as to take away absolutely the voluntary character of the act of the person subjected to such duress, under these circumstances the required marital consent can not be given and therefore the marriage is invalid by the natural law. Consequently, marriages of the unbaptized contracted under the constraint of such violence or fear would be invalid whether or not there existed any positive civil determination on the matter.

But when there is question of moral force or fear by which the voluntary nature of the act of giving consent is greatly lessened but not destroyed, though it is certain that the marriage is nullified by ecclesiastical law, it is controverted whether the marriage is invalid by the natural law also, though the more probable opinion holds that it is. In these circumstances, then, only the marriages of Christians (who alone are bound by purely canonical dispositions) are certainly invalid. It is not incontestably certain that in similar circumstances the marriages contracted by unbaptized parties are invalid, for it is not above all doubt that such parties are bound by the impediment of violence and fear as formulated in Church law, since it remains an open question whether the Church law enlarges upon the demands of the natural law. For infidels, the civil law to which they are subject will determine the status of their marriage contracted under the influence of violence and fear. In the absence of any civil provision on the matter, their marriages in the face of this doubt of law are to be regarded as valid according to the norm of Canon 1014, unless Canon 1127 might be applicable to a convert.

FORM

As to the form of marriage, the natural law requires no special formality. All that is required is a mutual consent externally and reciprocally manifested by words or by signs or in any other man-

ner. This form as required by the natural law is sufficient for the validity of the marriages of the unbaptized, not only in places where there is no civil disposition regarding the formalities for the celebration of marriage, but also in places where the civil formalities are prescribed as a requirement for lawfulness only.

This simple form of the natural law is sufficient, in spite of required civil formalities, for the validity of marriages among those baptized persons who are not bound to observe the canonical form. The Church alone is competent to legislate in this matter for the baptized, and if she sees fit to exempt certain persons from the observance of the form prescribed by her law (as in fact she does in Canon 1099, § 2), then those persons are not bound by any form other than that required by the natural law. They are not bound to observe the formalities prescribed by civil law (even those required for validity), because the civil authority has no power to legislate for the marriages of the baptized, except as regards the merely civil effects of marriage. Hence a common law marriage between baptized non-Catholics would be valid even though the civil law of the place did not recognize the validity of such a union.

On the other hand, it can not be said that the validity of their marriage as to form (or in any other respect) is to be determined by the regulations of the heretical or schismatical sects to which they may belong, for these non-Catholic religious bodies lack any authority in such matters.

The merely natural form is sufficient also for the validity of a marriage between an unbaptized person and a baptized person who is not held to the canonical form of marriage. In such a case the matter of the form of marriage, according to the more probable opinion, is governed not by the civil law but by the law of the Church. But since no formality is demanded by the Church in this instance, the civil prescriptions regarding the form can not affect the validity of the marriage.

As regards the civil form for marriage, it must be said that the State is fully competent to legislate in this matter for its unbaptized subjects who marry among themselves. In prescribing these formalities for the celebration of marriage the civil authority may insist upon their observance under pain of nullity. For that reason, if two unbaptized persons should enter a common law marriage in a State where such unions are held by law to be null, their

marriage would be invalid. In this country the form required by civil law for the celebration of marriage differs among the various States, but generally there is prescribed some kind of ceremony before a civil official or a minister of religion.

From the standpoint of the sacrament of Christian marriage, the parties to the contract are themselves the ministers of the sacrament. But in reference to marriage in general (both among Christians and among infidels), the term minister is often used in a broad sense to designate the priest, minister, rabbi, or civil official who may be competent to assist or officiate at the marriage. It is in this broad sense that the term is about to be used here. In the United States the principle of religious liberty has been given expression by the recognition of all forms of religion as equal before the law. Consequently, all licensed or ordained ministers of the Gospel (and this term either by statute or by accepted jurisprudence includes priests and rabbis as well as Protestant ministers) are generally designated by the laws of the various States as competent to officiate at the exchange of marriage consent. In two States, ministers of religion exclusively are held to be competent to assist at marriages; but in all others this competence is extended to certain civil officials.

In no State, however, is there required a civil ceremony apart from the religious ceremony. The parties are free to choose whether they will contract marriage before a minister of religion or before a competent civil official; or, if they wish, the parties may have both a religious and a civil ceremony. The attitude of the civil authority on this point may be said to be a favorable one in that it places no obstacles to or restrictions on the exercise of the sacerdotal function in assistance at marriage. In a certain sense, however, this attitude is a patronizing one, and from it there can arise certain practical conflicts of jurisdiction between Church and State. From the viewpoint of the State, its own civil form is entirely sufficient for the validity of marriage between any two parties, baptized or unbaptized, who are capable of entering the marital relationship. Hence, a marriage between two Catholics contracted before a civil official or a Protestant minister is held valid in civil law, whereas in fact such a marriage is invalid because of the lack of canonical form. On the other hand, if the presence of a competent minister were demanded by civil law under pain of nullity,

and if for some reason civil competence were denied a priest authorized by Canon Law to assist at the ceremony, the marriage of two Catholics, even though valid by the canonical form, could be regarded as invalid at civil law. In either case, the civil authority would exceed its competence in attempting to apply its legislation to a matter over which it has no power.

There is no practical difficulty arising from the civil requirement in this country for witnesses to the celebration of marriage. In almost half the States there are no regulations on the matter; and in those States which directly or indirectly do require that marriage be celebrated in the presence of witnesses, neither the absence nor the incompetence of witnesses is regarded as having any effect on the validity of the marriage. Here, again, there is a possibility of conflict of jurisdiction by reason of the failure of the State to recognize the binding force of the canonical form for those whom the Church holds to its observance, for by the law of the Church the presence of witnesses is required for the validity of the marriage.

SEPARATION

Canons 1128-1132 treat of the separation of husband and wife. After stating that separation is allowed for a just reason, they list some legitimate causes for separation and indicate certain conditions and restrictions for the exercise of the right to separate, and make provision for the custody and education of the children. When it seems impossible for husband and wife to live together, the Church allows them to live apart, and strives at the same time to soften the evils of this separation by such remedies as are suited to their condition; yet she never ceases to endeavor to bring about a reconciliation. The only cause that justifies a permanent separation is adultery, an intrinsic cause in that it militates against the unity of marriage. Certain other causes which are extrinsic to marriage are sufficient, however, to justify a temporary separation (apostasy, a criminal manner of living, cruelty, grave spiritual or corporal danger.) In this country the laws of those States in which a judicial separation may be obtained recognize quite generally the causes given in the Code. In one State divorce from bed and board is prohibited and only absolute divorce from the bond is admitted. In other States, there is no positive legislation in regard to separation; since there is no provision in the common law on the matter,

a judicial separation can not be obtained in these States. By the laws of still other States, a separation will be granted only in favor of the wife.

In the consideration of conflicts in this matter, fundamental is the principle that questions of separation among the baptized pertain exclusively to the ecclesiastical judge. Hence civil tribunals lack competence to hear and decide such cases, unless it be a matter involving purely civil effects of marriage, and a case in which these civil effects are principally (and not merely incidentally or accessorily) in litigation.

In the United States the civil authority has usurped the judicial power of the Church over the matrimonial causes of the baptized. In practice, therefore, to avoid grave harm the parties may have recourse to the civil courts for the purpose of obtaining a judicial separation that will be recognized in the eyes of the State; but to do this they must obtain permission from the local Ordinary. In those States which either positively forbid, or make no provision for, separation from bed and board, it may be necessary for the innocent party to seek an absolute divorce; otherwise he or she will not have the full protection of the civil law in property rights and in regard to the custody of the children. But here again baptized persons would have to obtain permission for this from the proper ecclesiastical authority; and, in seeking the divorce, the parties would have to do so with the sole intention of securing the civil effects and with the realization that this civil action would have no effect on the matrimonial bond itself.

As to the civil provisions on separation so far as they affect the marriages of the unbaptized, these laws may be considered as proper and reasonable, provided that they do not admit abuse by granting separation for extrinsic causes that are inane or trivial, and provided that they do not attempt to touch the bond.

INDISSOLUBILITY

Marriage is intrinsically indissoluble by the primary precepts of the natural law and extrinsically indissoluble by the secondary precepts. Intrinsic dissolubility is that by which the contract can be dissolved by the will of the contracting parties on their own private authority. Extrinsic dissolubility is that by which the matrimonial bond can be dissolved by a higher authority under certain circumstances and for certain restricted causes. The principle of indis-

solubility, founded in the law of nature, is sanctioned by the divine positive law—both by the rule of the original institution of marriage and by the law of the New Covenant. Since marriage is by nature indissoluble, no merely human authority is competent to deal with the bond of marriage.

But on the other hand, since the primary end of marriage (the procreation and education of children) would not be radically defeated if it were lawful to dissolve marriage provided that this end was attained, neither the existence of marriage nor the good of society can be said to demand absolute indissolubility of the matrimonial bond. The only type of marriage that is endowed with absolute intrinsic and extrinsic indissolubility is a ratified and consummated Christian marriage. This quality of absolute indissolubility it derives from two elements taken together, its sacramental character and the fact of consummation. A limited and restricted dissolubility, though contrary to the secondary precepts of the natural law, is possible under divine authority. For that reason it is true that among the baptized a ratified and unconsummated marriage can be dissolved under certain conditions determined by the divine law. This, however, can be done only by power divinely conferred on the Church alone—and not at all by any power of the State. Between this dissolution of the bond as provided by divine law and pernicious civil divorce no comparison can be made.

DECLARATION OF NULLITY

Between the civil and canonical legislation regarding the declaration of nullity of a marriage there are some fundamental points of agreement and also some fundamental points of wide divergence. As to the marriages of the unbaptized, the civil courts are competent to grant a declaration of nullity if the marriage was contracted in contravention of civil regulations—provided, of course, that such regulations are themselves not contrary to the natural or divine positive law. When by reason of some civil impediment a marriage between two infidels is regarded as absolutely void, a judicial declaration of the nullity is not strictly required according to the civil regulations of most of the States, but it nevertheless can be sought and obtained as a precautionary measure. On the other hand, in the event that such a marriage is regarded as voidable by the civil law, then a judicial action is generally necessary. When

in such actions the civil provisions attribute to the sentence a merely declaratory force so that the marriage is held to have been null *ab initio,* the State is not exceeding its competence. By the laws of some States, however, the judicial declaration in regard to a voidable marriage is considered as having a rescissory or annulling effect, so that the marriage is held to be invalid not from the beginning but only from the time of the declaration. This concept seems to derive from the fact that at civil law certain contracts whose fulfillment may be partially hampered are rescindible at the will of the parties. And although the marriage contract is not held to be voidable or rescindible by the parties themselves, yet the civil authority has assumed to itself the power to effect a rescission. But certainly by divine law marriage is irrescindible. By this disposition of the civil law the judicial sentence in these cases is no longer a true declaration of nullity, even though it be designated by that term. Rather, it is a divorce from the matrimonial bond, and as such can not be warranted.

In the question of declaration of nullity, as in other matters involving marriage legislation and jurisprudence, the chief source of practical difficulty and of conflict of competence between Church and State lies in the fact that the States in this country do not recognize the competence of ecclesiastical tribunals. The civil courts have usurped the judicial power of the Church to judge and pass sentence in the matrimonial causes of the baptized. For, as has already been seen, the State enjoys competence in these matters only with respect to the merely civil effects, and even then only if the civil effects are the principal object of the litigation.

Yet the fact remains that the civil authority has arrogated to itself a judicial power over all marriages, whether of unbaptized persons or of baptized persons. In practice, to avoid open conflict with that authority and to prevent unjust and grave harm to themselves, it is often necessary for baptized consorts to seek (after obtaining proper ecclesiastical approval) a civil declaration of nullity of their marriage—or even a divorce if the nature of the civil legislation should require such action. But this, of course, must be done for the sole purpose of removing any civil obstacles to the freedom that may be conceded them by the divine law and by canon law. Hence, a declaration of nullity that will have for their marriage the true juridical effect connoted in the term must still be obtained from the competent ecclesiastical tribunal, or from the proper ecclesiastical authority if it be a case comprehended by the norms of Canon 1990.

Cases and Studies

FREEDOM OF RELIGION IN RESTATEMENT OF INTER-CHURCH-AND-STATE COMMON LAW

This article deals with the claimed *privilege* of a minister of a church to enter without permission upon the land of another for the purpose of exercising his religion by orally preaching, by playing phonograph records of sermons, or manually delivering printed sermons, or otherwise.[1] It discusses this privilege, in the main, so far as it is necessary to answer the question whether the spiritual purpose, for which the unauthorized entrance upon the premises was made, justifies or excuses the act to such an extent that the minister cannot be punished criminally by fine or imprisonment in the same manner as one who does the same act for a non-spiritual or temporal purpose.

This question was raised in the case of *Grace Marsh* v. *the State of Alabama*,[2] decided by the United States Supreme Court on January 7, 1946. A Jehovah's Witness had entered upon the property of another (a private corporation) for the purpose of distributing religious literature to invitees and licensees of the owner. The owner ordered her to leave the premises. She refused. Whereupon she was arrested on a charge of criminal trespass under the following provision of the Alabama Code: [3]

> "Trespass after warning. . . .
> Any person, who, having entered . . . on the premises of another . . . and . . . refuses, without legal cause or good excuse, to leave immediately on being ordered . . . to do so . . . shall, on conviction, be fined . . ."

[1] Compare what the fictitious character, Father Smith, on page 127 of *The World, the Flesh, and Father Smith,* by Bruce Marshall, (Houghton Mifflin Company, 1945) says: "It was no use preaching the gospel only to those who came to church to hear it. The gospel ought to be preached to those who didn't want to hear it as well; to industrialists in their offices, to clubmen in their windows, to workers in their yards and factories, to bibbers in their taverns, to harlots in their doorways, to all those should the sweet tidings of Christ be taught."

[2] 66 S. Ct. 276; 90 L. ed. Adv. Op. 227.

[3] Title 14, Section 426, Alabama Code 1940.

An owner of real property has, at common law, a legal right of excluding others from it. All others are under a legal duty of keeping out and can be sued in court, under principles of the Law of Torts (i.e., Civil Wrongs), if they do not. But this right is not absolute. Common law judges have, over a period of several centuries, very grudgingly yielded ground in the competition of other interests, individual, social, political, or religious, for the delimitation of the right of the landowner to exclude others from his land.

There is no reported decision in favor of a *plaintiff-claimant* seeking to enforce, in advance, a right to enter upon the land of another without permission of the owner. There are now a few decisions which lay down the legal principle that, in the Law of Torts (i.e., Civil Wrongs), an act which, if done under ordinary circumstances, would make the actor liable for invasions of another's legally protected interests of which it is a legal cause, may be done *for certain purposes* without liability for some or all of such invasions.[4] Legal scholars, while conceding that the landowner's right of excluding others from his land is not absolute have been forced to extremes in conceiving admitted delimitations of this right. Pound gives us this example: "I have a recognized interest in the exclusive enjoyment of my garden. If a lunatic chases you with a hachet, the law confers on you a privilege in that emergency of running across my garden to safety."[5]

But it was not until 1908 that an *American* court decided that at common law a person would not be guilty of actionable trespass if he went upon land of another for the purpose of preventing serious bodily harm to himself or damage to his property. In *Ploof* v. *Putnam*,[6] the plaintiff was sailing a boat on Lake Champlain. His family was with him. A violent storm arose. To save the lives of the occupants and to prevent the destruction of the boat the plaintiff

[4] "See Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personalty," by Francis H. Bohlen, in 39 *Harvard Law Review* 307 (January 1926).

[5] *Contemporaneous Juristic Theory*, by Roscoe Pound (printed for the Friends of The Colleges at Claremont 1940) pp. 72 et seq. Cf. 37 Hen. VII, pl. 26. "A traveler on a highway, who finds it obstructed from a sudden and temporary cause, may pass upon the adjoining land without becoming a trespasser, because of the necessity."—*Campbell* v. *Race*, 7 Cush. (Mass.) 408, (1851).

[6] 81 Vt. 471, 71 Atl. 188 (1908).

moored it to the defendant's dock which was located on (the defendant's) privately owned land. The defendant ordered the plaintiff to withdraw from his land. On refusal the defendant cast off the line which secured the boat to the dock. The storm drove the boat upon the shore where the wind and waves wrecked it. The plaintiff, his wife and children were injured. The plaintiff sued the defendant and declared on two counts: one in trespass, charging that the defendant wilfully unmoored the boat; the second, in case, alleging that the defendant was under a duty to permit the plaintiff to moor his boat to the dock and to permit it to remain on the defendant's premises during the continuance of the storm, and alleging that the defendant wrongfully unmoored his boat in disregard of that duty.

The Supreme Court of Vermont sustained both counts declaring that a person is privileged to enter upon the land of another without permission if the entry is for the purpose of saving life and preventing destruction of property.[7]

This principle precludes the act of unpermitted use of another's real property from being a technical trespass, actionable as such. Furthermore, it prohibits the owner from preventing such use as is necessary for the saving of the other's life and, under some circumstances, his property.

In the United States Supreme Court case the Jehovah's Witness contended that to construe the State statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments of the Constitution, specifically arguing that a minister of a church is privileged to enter without permission upon the land of another for the purpose of exercising his religion by orally preaching or manually delivering printed sermons. The contention of the defendant was rejected in the trial court and she was convicted. The defendant appealed to the Alabama Court of Appeals. This court affirmed the conviction, holding that the statute as applied was constitutional because the title to the land was privately owned and because it had not been

[7] The Vermont court cited the following authorities in support of this principle of law: *Campbell* v. *Race,* 7 Cush (Mass.) 408 (1851); *Hyde* v. *Jamaica,* 27 Vt. 443 (1855); *Proctor* v. *Adams,* 113 Mass. 376 (1873); *Morey* v. *Fitzgerald,* 56 Vt. 487 (1884); *Miller* v. *Fandrye,* Poph. 161 (1624); *Henn's Case,* W. Jones 296 (1632); *Mouse's Case,* 12 Co. 63 (1606); *Dunwich* v. *Sterry,* 1 B. & Ad. 831 (1831); Y. B. 21 Edw. IV 64; Y. B. 21 Hen. VII 27; Y. B. 37 Hen. VII pl. 26; Viner's Abr. "Trespass", K. a. pl. 1.

dedicated to the public. After the State Supreme Court had denied certiorari, the case was brought to the United States Supreme Court. There the conviction was reversed by a divided court. Mr. Justice Black wrote the opinion for the majority. Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge concurred. Mr. Justice Frankfurter also concurred, but delivered a separate opinion. Mr. Justice Reed gave the dissenting opinion, in which he was joined by Chief Justice Stone and Mr. Justice Burton. Mr. Justice Jackson, (who had dissented in the *Struthers Case,* 319 U. S. 141, decided on May 3, 1943), took no part in the consideration or decision of this case.[8]

If the principle of law advocated by the majority were restricted by the United States Supreme Court to the precise facts of the case —that is, to private property in a company-owned town where the owner for his own advantage has permitted restricted public use by his licensees and invitees—still it would not have the support of any common law decisions.

As Mr. Justice Reed said in his dissent: " This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner." [9] The majority had said: " When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." [10]

If the majority of the United States Supreme Court thereby advocates, as a principle of law, that a minister of a church is privileged to enter without permission upon the land of another for the purpose of exercising his religion by orally preaching or manually delivering printed sermons, the hitherto limited scope of incomplete privilege to inflict intentional invasions of an individual's property is indefinitely extended beyond the so-called extremely rare emergency privileges, such as tying up a boat to a dock during a storm or running to shelter across a neighbor's land when chased by a lunatic with a hatchet, to the potentially crowded field of religious zealots.

If every individual American citizen is entitled by this novel prin-

[8] (He was in Europe as a representative of the United States in the trial of certain war criminals.)

[9] 90 L. ed. Adv. Op. 227, at 233.

[10] 90 L. ed. Adv. Op. 227, at 231.

ciple of Constitutional law to enter without permission upon the land of another for the purpose of religious exercises, there is good reason to believe that the probable consequences would be innumerable breaches of the peace, if not serious religious disorders.

If not every individual American citizen be entitled to enter without permission upon the land of another for religious purposes, but the privilege be limited to *ministers* of organized churches, the result would still be breaches of the peace. There were in continental United States in 1936, 256 Religious Bodies with 199,302 organizations and 55,807,366 members, according to the United States Bureau of the Census. No realistic person can read the opinion of Mr. Justice Jackson in *Douglas v. Jeannette,* 319 U. S. 157, (decided by the United States Supreme Court on May 3, 1943), without realizing the potential discord which can be created if full effect shall be given to the principle advocated by the majority in the *Marsh case.*

The secular court judicially decreed the existence of a new privilege in a spiritual matter for members of churches, a privilege which had not been recognized and secured previously at common law. The First Amendment to the Constitution of the United States certainly did not create the right to enter without permission upon the land of another for religious exercises. The First Amendment creates no such *positive* legal rights. In the words of Mr. Justice Reed in his dissent in the *Struthers case*: "The First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion."[11] The character of the First Amendment is wholly *negative* in this respect. It declares, in part, that "Congress shall make no law respecting the establishment of religion, or, *prohibiting* the free exercise thereof" [emphasis inserted].

The Fourteenth Amendment equally restrains the States. This amendment was not always considered to have this force. However, the States had, from their first days, placed *restraints* upon

[11] 319 U. S. 141 at page 157; 87 L. ed. 1313, at 1324, (1943). "The privilege of engaging in religious activity does not come from the state; but is guaranteed by the federal Constitution."—38 *American Political Science Review,* 279, (1944). Assuming the truth of this statement, it is submitted that the privilege of engaging in religious activity comes from a sovereign *church* having jurisdiction therefor.

themselves in their own Constitutions in order to protect their people in the free exercise of religion. Mr. Justice Reed, in his dissent in *Murdock v. Pennsylvania*,[12] says: "It is only in recent years that the freedoms of the First Amendment have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment from impairment by the States. Until then these liberties were not deemed to be guarded from State action by the Federal Constitution."

In connection with Mr. Justice Reed's statement, it is to be noted that he, in common with other justices of the Supreme Court of the United States, treats the exercise of religion as a fundamental personal *right*, placing it in the same category as the right of free speech and the so-called freedom of the press.

The worship of God is not a matter of *right* in the human being, considering the relation of God and creature. God is the only one with the *right* in this relationship. Man has but the *duty*.[13] No State has the power to confer such a right or impose such a duty. "The obligation . . . to worship God is imposed by divine natural law, dictated as clearly by man's natural reason, as the duty to love, reverence, and honor one's parents and one's country. . . . The divine natural law . . . is that which God, the author of nature, implanted in the heart of man, so that man, by the right use of reason, knows—sometimes almost instinctively—that certain actions are conformable and other actions non-conformable with his nature. Common sense therefore dictates that all men—baptized or unbaptized, Catholic, Protestant, Jew or Pagan—are bound by this law. . . ."[14]

The founding fathers had sought to solve the practical problems of law which confronted them by a theory of natural rights. They hoped that every natural right would be fully secured. "Freedom of religion" gave the framers of the Constitution great concern. After much discussion it was determined that the free exercise of religion would not be *affirmatively* secured, but nevertheless, it must

[12] 319 U. S. 105, at 126, 87 L. ed. 1292, at 1306, (1943).

[13] Madison, one of the greatest advocates of the First Amendment, defined religion as "the duty we owe the Creator", declaring that it is not within the cognizance of civil government. See opinion of Mr. Justice Waite in *Reynolds* v. *United States*, 98 U. S. 145, 163, 25 L. ed. 244, 249.

[14] "General Norms of the Canon Law," by Rev. Francis J. Murphy, S.T.D., in THE JURIST, IV (1944) 381, 382.

not be *infringed.* It was to be secured by a liberty, *by a condition of legal hands off,* permitting each individual to become a member of the organized church of his own choice or not to become a member of any church.

The public expression of man's worship of God is usually evidenced by his affiliation with a religious society or church organized for this spiritual purpose. Until he becomes a member of some religious society or church, a man does not subject himself to the jurisdiction of any religious society or church (unless he consents or subjects himself to such jurisdiction). Pound says: "In short, it is not the isolated man, the Robinson Crusoe, who must be regarded from the juridical standpoint, but the social man, the only one for whom it is necessary to fix rights and duties." [15] But on becoming a member a man takes on the religion of his particular church, for examples, a member of the Roman Catholic Church exercises the Roman Catholic religion, and a member of the Baptist Church exercises the Baptist religion.

The First Amendment, by declaring that "Congress shall make no law . . . *prohibiting* the free exercise [of religion]", does not give a member of a religious society or church the *right* to exercise his religion, but it does guarantee that any law enacted by Congress which unduly impedes his *duty* to worship God in accordance with his religion is invalid.[16] Neither the Federal Government, nor a State, nor any political subdivision thereof, can confer a legal right, grant a legal power, or confer a privilege in spiritual matters. And American common law secures in spiritual matters no interests of individuals, no social interests, no public interests, and no church interests by a declaration of legal rights, by the conferring of legal powers or the granting of legal privileges.

In the United States the jurisdiction of a church in purely spiritual matters is exclusive of the jurisdiction of the state in which

[15] Roscoe Pound in "Fifty Years of Jurisprudence,"—51 *Harvard Law Review,* January 1938, 444, 464, 465, quoting François Gény (1861—) professor in the Catholic University of Nancy, of whom Pound says: "In the second (neo-Scholastic) line, François Gény stands pre-eminent."

[16] Every State constitution contains some guaranty of religious freedom. This is usually granted in terms of "liberty of conscience", e.g. California, Const. art. 1, section 4; Illinois, Const. art. II, section 3; or "freedom of religious worship", e.g. New York Const., art. 1, section 3; Indiana, Const., art. 1, section 3.

the church is located. The jurisdiction of the state in temporal matters is *per se* exclusive of the jurisdiction of the church.[17]

A church has jurisdiction only over persons who are members of that particular church and over non-members who have consented or subjected themselves to the exercise of jurisdiction over them either before or after the exercise of jurisdiction. A State has jurisdiction over a person if he is within the territory of the State, if he is domiciled in the State although not present there, or if he has consented or subjected himself to the exercise of jurisdiction over him either before or after the exercise of jurisdiction. These two jurisdictions are mutually exclusive, the jurisdictions of different sovereigns.

Leo XIII, speaking for the Catholic Church, said: "God has divided the government of the human race between two authorities, ecclesiastical and civil, establishing one over things divine, the other over things human. Both are supreme, each in its own domain; each has its own fixed boundaries which limit its activities. . . . Everything therefore in human affairs that is in any way sacred, or has reference to the salvation of souls and the worship of God, whether by its nature or by its end, is subject to the jurisdiction and discipline of the Church. Whatever else is comprised in the civil and political order, rightly comes under the authority of the State; . . ."[18]

[17] The Roman Catholic Church claims jurisdiction over its members in temporal matters bound to spiritual matters as well as in purely spiritual matters. Cf. *Codex Iuris Canonici,* canon 1553, § 1: Ecclesia iure proprio et exclusivo cognoscit: 1. De causis quae respiciunt res spirituales et spiritualibus adnexas: . . . As to cases of mixed jurisdiction,, cf. THE JURIST, IV (1944), 551, 552; canon 1553, § 2. The United States Supreme Court case of *Watson* v. *Jones* (13 Wall. 679), in some respects, appears to support this claim. Note the statement of Mr. Chief Justice Alvey in *Satterlee* v. *Williams,* (20 App. *Cas. D. of C.* 393 [1902]; ". . . in the case of *Watson* v. *Jones* . . . in order to determine the rights to the property in controversy, it was deemed necessary to determine the effect that should be allowed to the judgment of certain judicatories of the church as to the *status* or relation of the parties to the church and the property in litigation . . . it was held, that where the right of property in the civil courts is dependent on the question of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil courts will accept that decision as conclusive . . ."

[18] Ep. encycl. *Immortale Dei,* 1 Nov. 1885.—See *Four Great Encyclicals* (1931 edition published by The Paulist Press) at pages 52 and 53. As to the baptized non-Catholic, through baptism he has fundamentally subjected him-

On this point Reverend James P. Kelly, J.C.D. says: "With regard to human law, the Church adheres to the doctrine that all authority is from God, and that in God's plan for the orderly government of the world, He has delegated His authority to two perfect sovereign societies. Each of these sovereign societies is *independently* and *exclusively* competent to regulate the affairs of men within its own sphere. These two sovereign powers are the Church and the State. The Church was established by God for the spiritual welfare of man in this world and to lead him to an eternity of happiness in heaven. The State was constituted as the supreme authority for the temporal welfare of man in this world. . . The legitimate civil authority, which we shall call the State, is considered by the Church to have been granted authority from God to legislate, administer and pass judgment within its own sphere, but that sphere is confined to the temporal welfare of man in this world to the exclusion of his own spiritual welfare, and the means established by God to lead man to eternal life." [19]

Dean Pound says: "In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental. It seemed as natural and inevitable to have church courts and state courts, each with their own field of action and each, perhaps, tending to encroach on the other's domain, but each having their own province in which they were paramount, as it seems to Americans to have two sets of courts, federal courts

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self to the jurisdiction of the Catholic Church. However, in virtue of custom or epikeia the tacit exemption of those who are in good faith may be assumed in regard to laws that are not invalidating or disqualifying. Cf. Cicognani, *Canon Law* (trans. O'Hara and Brennan, Philadelphia: The Dolphin Press, 1935), 568, 569.

[19] "Marriage, Divorce and Annulments,"—The Jurist, IV (1944), 246, 247. The Roman Catholic Church holds unswervingly to the doctrine that it is the one true Church. However, the members of this Church realize that the secular law considers churches of all denominations to be sovereigns and have exclusive jurisdiction over spiritual matters within their respective spheres.

This position is sharply evidenced in the opinions of Mr. Justice Murphy, a Roman Catholic, in the Jehovah's Witnesses cases.

Mr. Justice Frankfurter, in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, at 658, 87 L. ed. 1628, at 1648, is authority for this statement: "There are in the United States more than 250 distinctive established religious denominations."

and state courts, operating side by side in the same territory, each supreme in their own province . . . ." [20]

In the United States where religious liberty is guaranteed by the Federal and State Constitutions, where there is no State church, the number of sovereign churches capable of recognition as such by these Constitutions is theoretically unlimited.

"The organization of religious societies in this country may be effected, and generally is, by one of three different systems of church government, episcopacy or prelacy, presbyterianism, or congregationalism, the first of which systems may be described as a church ruled by one or by a special group by virtue of a claimed divine right; the second, as a church in which the powers of government are vested in a body of believers and are exercised through their chosen representatives, the local church being subordinated to the control of a supreme governing body, and the third, as a church where each local body is a self-governing independent democracy. Typical of the independent group are the Congregational societies and churches in New England, while the Presbyterian congregations associated with the early history of New York, New Jersey, and Pennsylvania are illustrative of the group in which the local congregation is controlled by superior representative bodies, and the Roman Catholic and Episcopal Communions are the groups representing a church government by one or a group ruling under a claim of divine right." [21]

The little village church, not affiliated with any other church, and with but a handful of members is considered in the secular law to be just as sovereign, relatively speaking, as the great international churches with millions of members, and the rights which it confers on its few members in spiritual matters may be recognized in inter-church-and-state common law as are the rights conferred on the members of the greater churches.

The jurisdictional boundaries of the two sovereigns within the same territory, the one a church and the other the State, were

[20] "A Comparison of Ideals of Law," by Roscoe Pound, in 47 *Harvard Law Review* 1, at 6; herein Pound cited the case of *Prior of Castleacre* v. *Dean of St. Stephens* (Common Pleas 1506) Y. B. 21 Hen. VII, 1, in which the fifteenth-century court held an act of Parliament "impertinent to be observed" where it sought to effect results in matters spiritual. Cf. Statute of Westminster I, (1275) 3 Edw. I, preamble.

[21] 54 C. J. 7.

sharply outlined in the leading case of *Watson v. Jones*,[22] decided by the United States Supreme Court on April 15, 1872. In that case Mr. Justice Miller said: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. . . . We cannot better close this review of the authorities than in the language of the Supreme Court of Pennsylvania, in the case of *German Reformed Church v. Seibert,* [41 Pa. 21]:

> 'The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.' . . ."

The subject-matter of controversy in *Watson v. Jones* was the right to the *use* of certain church property as between parties of a divided congregation. In order to determine the *ius utendi* of the property in controversy, it was deemed necessary to determine the effect that should be allowed to the judgment of certain judicatories of the church as to the status or relation of the parties to the church and the property in litigation. It was in this connection that the general principle of the conclusive nature of the jurisdiction of ecclesiastical courts or tribunals was discussed.

In the proposed Restatement of Inter-Church-and-State Common Law[23] it is submitted that the definition of jurisdiction should be:

> Section 42C. As used in the Restatement of this Subject, the word "jurisdiction" means the power of a church to create interests which under the principles of the common law will be recognized as valid in the State in which the church is located.

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[22] 80 U. S. (13 Wall.) 679, 727, 732; 20 L. ed. 666.

[23] Cf. "Restatement of Inter-Church-and-State Common Law," by O'Brien and O'Brien, in THE JURIST, V (1945), 73.

As to the exercise of power by churches without jurisdiction, e.g. over temporal matters not bound to spiritual matters, it is submitted that the following sections would be applicable:

> Section 43C. Churches cannot create interests if they have no jurisdiction.
> Section 46C. Jurisdiction Over Person or Thing.
> (1) Jurisdiction is exercised over a person by creating interests which affect the person.
> (2) Jurisdiction is exercised over a thing by creating interests in relation to the thing.

In *Watson v. Jones* the courts of the Presbyterian Church were acknowledged as having the power to create interests, and they did create interests, which under the principles of common law were recognized as valid in the State of Kentucky where the church was located. To do this the church had to be recognized as having jurisdiction over *both* the subject-matter of the controversy and of the parties engaged in the controversy. Otherwise the church courts would not be acknowledged as having the authority to give judgment as to the status or relation of the parties to the church and the property in litigation.

It is that power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court, which is called jurisdiction.[24] A sovereign church has the power to affect the rights of certain persons by legislation, by executive decree, or by the judgment of its courts. But a sovereign church's power to so affect the rights of persons is strictly limited to its own membership and to those outside of its membership who have consented or subjected themselves to the exercise of the church's jurisdiction over them. And the sovereign church's power so to affect the rights of persons is *per se* strictly limited to spiritual matters and temporal matters bound to spiritual matters. If a church has no jurisdiction, either because the subject-matter is not spiritual or because the persons involved are not members of the church or have not consented or subjected themselves to the exercise of the church's jurisdiction over them, the church cannot create interests that will be recognized by inter-church-and-state common law. On the other hand a State cannot create interests in spiritual

[24] "The Jurisdiction of a Sovereign State," by Joseph H. Beale, in 36 *Harvard Law Review* 241.

matters because States have no such jurisdiction.[25] In the case of *Watson v. Jones* the Presbyterian Church was acknowledged to have personal jurisdiction of the parties to the controversy and also of the subject-matter. It thus was acknowledged as having the power to create interests which under the principles of the common law will be recognized as valid in the State in which the church is located.

In recent years Jehovah's Witnesses have claimed that they have an interest secured by a legal right to call at the homes of those who are not members of their church and there deliver, orally, or by the playing of phonograph records, or in writing, expositions of their own doctrines and refutations of the doctrines of other churches. The legality of this claimed right was raised in the case of *Thelma Martin v. the City of Struthers*,[26] decided by the Supreme Court of the United States in 1943. The facts of the case were as follows:

Thelma Martin, a Jehovah's Witness, went to the homes of strangers in the City of Struthers, Ohio, knocking on doors and ringing door bells in order to distribute to the inmates of the homes leaflets advertising a religious meeting of Jehovah's Witnesses. In so doing she proceeded in a conventional and orderly fashion. The City had an ordinance:

> "It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars, or other advertisements they or any person with them may be distributing."

For delivering a leaflet to the inmate of a home she was convicted in the Mayor's Court and was fined $10.00 on a charge of violating the City ordinance.

Thelma Martin appealed from the conviction by the Mayor's Court to the Supreme Court of the State of Ohio. The Supreme Court of the State of Ohio dismissed the appeal from the judgment of the Mayor's Court convicting the defendant of violation of the city ordinance.

She thereupon appealed to the Supreme Court of the United

[25] *Restatement of the Law of Conflict of Laws*, by the American Law Institute, (1934), section 43.

[26] 319 U. S. 141; 87 L. ed. 1313, (1943).

States from the judgment of the Supreme Court of the State of Ohio. She contended that the ordinance was unconstitutional because it abridged her rights of freedom of press, speech, and religion, contrary to the First and Fourteenth Amendments to the United States Constitution. The Supreme Court of the United States reversed the judgment of the Supreme Court of the State of Ohio, declaring that the State Supreme Court had erred in dismissing the appeal from the judgment of the Mayor's Court.

Mr. Justice Black wrote the principal opinion of the court and struck down the ordinance as invalid because " in conflict with the freedom of speech and press ". Mr. Justice Murphy wrote a separate opinion in which he declared that the ordinance was invalid because in conflict with " freedom of religion ".

Mr. Justice Murphy said:

" I believe that nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions. . . .

" Also, few, if any, believe more strongly in the maxim, ' a man's home is his castle ' than I . . . . If this principle approaches a collision with religious freedom, there should be an accommodation, if at all possible, which gives appropriate recognition to both. That is, if regulation should be necessary to protect the safety and privacy of the home, an effort should be made at the same time to preserve the substance of religious freedom."

It is submitted that Mr. Justice Murphy premised his decision on the common fundamental error that the United States, by the First and Fourteenth Amendments, *" gives " rights* to the members of the estimated " 256 religious bodies " in the country in spiritual matters. Mr. Justice Murphy declares, in *the Struthers case*, that the provision of the First Amendment as to " freedom of religion " *gives* to the members of the 256 religious bodies *the right*, without being expressly permitted to do so, to enter upon the premises of another, ring the door bell, sound the knocker, or otherwise summon the inmate or inmates of the home to the door for the purpose of distributing handbills advertising religious meetings, or for the purpose of exercising their religion by orally preaching or manually delivering printed sermons; and, *in the Marsh case*, that the provision of the First Amendment as to " freedom of religion " gives to

the members of the 256 religious bodies *the right* to enter without permission upon the land of another, and, even after being ordered to leave, *the right* to exercise their religion by orally preaching or manually delivering printed sermons to the occupants and their guests.

Admittedly Jehovah's Witnesses and other religious bodies assert as a religious interest a claim to enter without permission upon the land of another for the purpose of advancing their particular religions. However no State has attempted to secure this interest by the enactment of a statute purporting to confer any such right. To create such a right the State would have to have jurisdiction both of the subject-matter and over the persons involved. The preaching of sermons is plainly a spiritual matter. As a State has no jurisdiction over spiritual matters it cannot create interests therein. It is submitted that such hypothetical statutes would be unconstitutional. Section 43 of *Restatement of the Law of Conflict of Laws* (American Law Institute, 1934) provides:

> Under the Constitution of the United States the States cannot create interests if they have no jurisdiction.

The *Comment* on this section is as follows:

> a. *Effect of Fourteenth Amendment to Constitution.* If a State attempts to exercise power by creating interests with respect to persons or things which it has no jurisdiction to create, its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself. The Supreme Court of the United States may review all cases whether from a lower Federal court or from a State court of last resort which involve a question of the exercise of power on the part of a State when it has no jurisdiction.

How far it is, or should be, a violation of the Constitution of the United States whenever *a court* attempts to create rights or other interests where it has no jurisdiction, either over the person or over the subject-matter, has not yet definitely been decided.[27] That a

[27] Cf. Section 43 d of *Restatement of the Law of Conflict of Laws,* (American Law Institute, 1934). It is submitted that the *courts* alone legislated the almost absolute dominion over land which is possessed today by every owner. *Legislatures* took but a very minor part in the development of the law of property in this respect.

State court has no power to create rights or other interests beyond its jurisdictional boundaries is, however, well settled.

The Supreme Court of the United States had, in fact, in both *the Struthers case* and *the Marsh case* encroached upon the jurisdiction of sovereign churches in spiritual matters, over which that court had no jurisdiction, and secured religious interests by conferring *privileges* to members of a particular religious sect. In this the Supreme Court violated a fundamental policy of the United States, *separation of Church and State*.[28] In spiritual matters the State must keep " hands off ". It cannot exercise executive jurisdiction, legislative jurisdiction or judicial jurisdiction over spiritual matters, and cannot create rights or other interests in such matters. The Supreme Court failed to make " the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign " mentioned by Pound in his article titled: " A Comparison of Ideals of Law ".[29]

In both *the Struthers case* and *the Marsh case* the approach of some of the members of the United States Supreme Court was inadequate because they premised their decisions on the theory that the First Amendment creates rights and interests in spiritual matters, which it does not. In these cases the Supreme Court should have determined firstly, whether or not Jehovah's Witnesses, as a sovereign church, or religious society, had attempted to exercise jurisdiction to create a right or privilege in its members to enter without permission upon the land of another for the purpose of exercising their religion by orally preaching or manually delivering printed sermons; and secondly, whether or not the State will recognize, *under the principles of Inter-Church-And-State Common Law*, that asserted right or privilege as valid.

The Supreme Court of the United States would probably recognize (the Church of) Jehovah's Witnesses as a sovereign but

[28] In 1275 one of the great English statutes of the thirteenth century recited that Parliament had met to make laws " for the common profit of holy Church, and of the Realm." Statute of Westminster I, 1275, 3 Edw. I, preamble. In 1506, an English court, in the case of *Prior of Castleacre* v. *Dean of St. Stephens* (Common Pleas 1506) Y. B. 21 Hen. VII, 1, held an act of Parliament " impertinent to be observed " where it sought to effect results in matters spiritual. See note 20 *supra*.

[29] See note 20 *supra*.

not the sovereign church of the United States. It should recognize that the jurisdiction of this church is limited to spiritual matters and does not extend over persons who are not members of the church or over persons outside of its membership who have not consented or subjected themselves to the exercise of the church's jurisdiction over them. It should recognize that the State, not having jurisdiction in spiritual matters, can confer no rights nor impose any duties in spiritual matters. It must look to enactments of the legislature, if any, of the Church of Jehovah's Witnesses to discover what rights and duties have been conferred and imposed upon the ministers and laity of that church, and in cases of controversy it must be guided by the decrees of the judicial body of the church.

That the Church of Jehovah's Witnesses has no power to confer rights or impose duties upon the members of any other of the 256 religious bodies in this country, who do not consent thereto, is self-evident, this church having no jurisdiction over such persons. It follows that the legislature of the Church of Jehovah's Witnesses, if any, can confer upon its ministers no right to preach the gospel from door to door of the non-members of this sect, nor can a legislature of the Church of Jehovah's Witnesses impose upon non-members of this church the duty to answer a door-summons by a minister of the Church of Jehovah's Witnesses engaged in the advancement of any religious activity, or give to its ministers the privilege of entering without permission upon the premises of another for the purpose of exercising their religion by orally preaching, by playing phonograph records of sermons, or manually delivering printed sermons.

In like manner, if priests of the Roman Catholic Church entered upon the land of another for the purpose of exercising their religion by administering spiritual goods, and objections were made thereto by the State or individual citizens, resulting in court proceedings, secular courts could not look to the so-called " freedom of religion " clause of the First Amendment to determine whether or not it had conferred upon the priests the right so to do. Secular courts would first have to look to the *Codex Iuris Canonici,* the law of that Church, to discover what rights had been conferred and what duties imposed, in these respects, by the Church; and, secondly, would have to determine whether or not the State will recognize the asserted rights as valid, under the principles of Inter-Church-and-State Common Law.

Secular courts would find the Roman Catholic Church asserting her sovereignty in spiritual matters in Canon 1322, § 2:

> The Church, independently of any civil power, has the right and the duty of teaching all peoples the evangelic doctrine; all are bound by the divine law to learn of and embrace the true Church of God.

Having asserted her sovereignty in spiritual matters the Roman Catholic Church has conferred rights and imposed duties upon those over whom it has jurisdiction. Canon 682 states:

> The laity have the right to receive from the clergy, according to the rules of ecclesiastical discipline, spiritual goods, and especially the means necessary for salvation.

Other portions of this Church's law set forth more fully the duties which are imposed upon priests, many of which duties require that the priest enter upon the land of another, under proper circumstances, for the purpose of exercising his religion. As examples, not all-inclusive, however, the secular courts would learn from Canons 467, 468, and 469 of the *Codex Iuris Canonici*, that the pastor must celebrate the Divine offices, administer the Sacraments to worthy petitioners, know his people, correct sinners prudently, be kind to the poor and afflicted, show zeal in the religious education of children, be constant and charitable in his care of the sick and dying, guard faith and morals, and encourage works of piety, charity, and zeal.

Secular courts would learn from local ecclesiastical legislation, such as, for example, the Statutes of the Archdiocese of Los Angeles, that the pastor should know his parishioners not only generally, but individually and personally, and that from the time a priest takes charge of a parish he should call upon each family in turn. The courts would learn that he is obliged, on special occasions and under proper circumstances, to enter upon property belonging to the State and Federal Governments, and political subdivisions thereof, for he is required to visit those imprisoned in jails, houses of correction, and similar places, in order to instruct them in their faith, admonish them to amend their lives, and lest through leisure and evil companions they become worse, the priest is exhorted to procure for them Catholic books and periodicals. Other local statutes require that the priest frequently visit the sick, wherever they may

be, in their homes, in hospitals, or other institutions and places.

The laws of the Roman Catholic Church, then, impose a duty upon its priests to enter, from time to time, upon the land of another for the purpose of exercising their religion by administering spiritual goods. Such a *duty,* however, must be dependent upon the co-relative *right* of the laity to receive from the clergy spiritual goods. Such a right on the part of the laity can be given by the church only to those over whom it has jurisdiction. A church has jurisdiction only over persons who are members of that particular church and over non-members who have consented or subjected themselves to the exercise of jurisdiction over them either before or after the exercise of the jurisdiction.

No problem arises when a member of the Roman Catholic Church is visited upon his own property by a priest. The Church has spiritual jurisdiction over both the priest and the person.

With regard to non-members of the Roman Catholic Church, the *Codex Iuris Canonici* legislates in Canon 1350:

> Bishops and pastors must hold non-Catholics living in their dioceses or parishes as commended to them in the Lord.

A *duty* is thereby placed upon priests to render spiritual care to non-Catholics, who have the same *right* as Catholic laity to receive from the clergy spiritual goods. In the case of a non-Catholic, however, there is a difference in the quality of the *right* which here is dependent upon the will of the non-member of the church to accept or reject it. If the non-Catholic land-owner accepts the right, then the Catholic priest's correlative duty to render religious services becomes operative, and he is obligated to enter upon the land of another if the holder of the right so wishes. Here the Catholic church has jurisdiction by the consent of the non-member.

If the non-Catholic is unwilling to accept the right to receive from the Catholic clergy spiritual goods, the duty of the priest to exercise his religion in favor of that non-member disappears. Here the Catholic Church has no jurisdiction.

The Catholic Church is mindful of the consent needed for jurisdiction over non-members, for the following canon, 1351, warns the priest:

> No one shall be forced to embrace the Catholic faith against his will.

The very laws of the Catholic Church thus protect the non-member over whom the church has no jurisdiction from any unwarranted interference on the part of her priests.

To be sure, a Catholic priest, subject to the laws of the State, may, in the pursuance of his parochial duties call at every home in his parish, including the homes of non-Catholics. His first procedure is to determine whether or not he has spiritual jurisdiction and a duty or a privilege to be there by ascertaining whether or not the householder is a Catholic, or at least a non-Catholic who *consents* to his presence. Upon the finding that he lacks jurisdiction, the priest, having no duty or privilege so to be on the property of another, must necessarily leave at once, for here he is unable to exercise his religion by administering spiritual goods.

Should the priest find, however, that he has jurisdiction either by membership or by consent, he may proceed to the proper exercise of his religion. It is this case which the First Amendment guarantees will not be impaired by the secular sovereign.

In like manner, the Church of Jehovah's Witnesses may impose upon its ministers the duty to call at the homes of its members and to administer to their spiritual needs in accordance with the tenets of their faith. The First Amendment, coupled with the Fourteenth, guarantees that neither Congress nor the States will pass any law prohibiting the exercise of the rights of members of that church to receive their ministers in the exercise of their religion.

For the right to preach *extra* the jurisdictional scope of their legally recognized spiritual sovereign (the Church of Jehovah's Witnesses), these ministers must derive their authority, if any, to do so, from any *rights* which may be conferred upon them by their *secular* sovereign, the State, by virtue of the right of free speech or the right of free press, granted by the secular sovereign's common law, legislative enactments, or constitutional provisions.

But insofar as " freedom of religion " is concerned, it is submitted that we can have it in the United States, under our present laws, without " denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street." [30]

[30] The legal extent of the impact upon " a man's . . . castle ", resulting from the granting by the secular courts to churches, their ministers and members, of privileges to inflict intentional invasions upon the property of another under the " freedom of the press " and " freedom of speech " clauses of the Federal

Constitution, is dependent upon fundamentally different legal principles from those determining the legal extent of the privilege to enter upon the land of another without permission for the purpose of exercising religion.

The "*right*" to exercise religion, of which many of the justices of the United States Supreme Court speak, is not a legal right in the same sense that an owner of real property has, at common law, the right of excluding others from it. The so-called "right" is an individual want, claim, or interest, which under that aspect of the political-juristic philosophy of the United States, styled "separation of Church and State", can not be secured through legal rights or through some other legal machinery. The State has no jurisdiction over the exercise of religion.

The right of freedom of speech and the right of freedom of the press, unlike the so-called "right" to exercise religion, can be secured and given legal effect by the State. They are temporal matters over which the State has exclusive jurisdiction. Their delimitations, in the exercise of this exclusive jurisdiction, are the subjects of much judicial dispute. It is submitted that churches, ministers, and church members occupy no "preferred" position over other citizens of the state in respect to "freedom of speech" and "freedom of the press."

Reverend Kenneth R. O'Brien
Daniel E. O'Brien

Los Angeles, California,

TERM OF OFFICE

I have been asked by a Community of Nuns to inquire about a canonical problem confronting their community.

At present the new constitution is in Rome for approval. They will have elections this fall. Both the old and the new constitutions provide that a sister who has been superior for two consecutive terms cannot be superior for a third consecutive term. But, under the old constitution, each term was three years; under the new, six years. Now, can the present superior who has had two terms under the old constitution be eligible for election under the new constitution—if it is approved by that time?

Protractor

There is no question here whether more than two terms can be conferred on the superior, since her incumbency is limited to two terms in both the old and the new constitutions. The problem arises from the divergence in the number of years constituting a term in the respective constitutions. However, neither of the constitutions specifies directly the *number of years* for which the superior may hold office. This is determined indirectly through the determination of the number of years constituting a term of office. A superior holding office under the old constitutions, therefore, determined the

number of years constituting her term by referring to the old constitutions; the superior holding office under the new, by referring to them. Another term of six years can not be conferred immediately on a superior who has just completed her second term of three years under the old constitutions. However, if her second term were not completed at the time the new constitutions were approved, it would, as to its termination, be ruled by the new constitutions, and hence would be prolonged so as to terminate only at the expiration of six years from its beginning.

LEGITIMATION AS REASON FOR DISPENSATION

In applying for a dispensation from the impediment of crime contracted by two Catholic parties as a result of a marriage attempted while the woman's husband was still living, though she had obtained a civil divorce from him, I alleged the legitimation of the child of the invalid marriage as the only reason for the dispensation. This child was born while the woman's husband was still living. The dispensation was duly granted. I am wondering about the sufficiency of the reason. I have only the word of the parties that it is their child.

RECORDOR

There is more than a possibility that this child is not the child of the parties to whom the dispensation was issued, or at least that it is to be juridically presumed the legitimate child of the valid marriage. In that case, of course, it would not need legitimation, and this, alleged as a reason for a dispensation, would simply be no reason at all. Of course, if it is clear that the woman's husband could not have had marital relations with her during a period of ten months antecedent to the birth of the child, the latter would be shown to be not the legitimate child of the valid marriage.[1] The fact that the husband is now dead precludes an attempt to determine negatively by a blood test whether the child is his legitimate child or not. Of course, it might be shown through the blood test that the man whom the woman now intends to marry could not be the father of the child. But that demonstration would be unavailing as a positive proof of the legitimacy of the child by the valid marriage. This matter should have been thoroughly investigated,

[1] Canon 1115, § 1. Pater is est quem iustae nuptiae demonstrant, nisi evidentibus argumentis contrarium probetur.

§ 2. Legitimi praesumuntur filii qui nati sunt saltem post sex menses a die celebrati matrimonii, vel intra decem menses a die dissolutae vitae coniugalis.

especially as to the relations between the woman and her husband during the ten months preceding the child's birth, before its legitimation was alleged as a reason for a dispensation.

But even if it were clear that the child was not the legitimate child of the valid marriage, but on the contrary the child of the man with whom the woman now desires to contract marriage, the reason alleged for the dispensation is not adequate. Canon 1116, which provides for legitimation through subsequent marriage, excepts the children of parents who were disqualified from entering marriage from the time of the child's conception to its birth, inclusive.[2] Moreover, the dispensation itself, which was presumably granted by the local Ordinary, does not effect legitimation in the case of a child conceived or born of adultery.[3]

Since, then, if legitimation is to be effected it must be otherwise than through the marriage of the parties or the dispensation from the impediment, it does not suffice as a reason for the granting of the dispensation.

However, as to the dispensation that has been granted, presumably in good faith, since, according to Canon 1042, § 2, 5°, the degree of the impediment of crime involved in the case constitutes a *minor* impediment, the dispensation should be held as valid in view of Canon 1054.[4]

IMPLICIT DELEGATION FOR MARRIAGE

The bishop of the diocese adjacent to the diocese in which I am pastor married his nephew in my parish under the following circumstances. I wrote to the bishop of the diocese in which I am pastor requesting that the parties be permitted to invite the bishop of the neighboring diocese for this precise

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[2] Canon 1116. Per subsequens parentum matrimonium sive verum sive putativum, sive noviter contractum sive convalidatum, etiam non consummatum, legitima efficitur proles, dummodo parentes habiles exstiterint ad matrimonium inter se contrahendum tempore conceptionis, vel praegnationis, vel nativitatis.

[3] Canon 1051. Per dispensationem super impedimento dirimente concessam sive ex potestate ordinaria, sive ex potestate delegata per indultum generale, non vero per rescriptum in casibus particularibus, conceditur quoque eo ipso legitimatio prolis, si qua ex iis cum quibus dispensatur iam nata vel concepta fuerit, excepta tamen adulterina et sacrilega.

[4] Canon 1054. Dispensatio a minore impedimento concessa, nullo sive obreptionis sive subreptionis vitio irritatur, etsi unica causa finalis in precibus exposita falsa fuerit.

ceremony and I received a favorable reply. They extended the invitation to him, explaining that both the bishop of my diocese and I were very willing that he should officiate. I met the visiting prelate when he arrived at the railroad station the night before the marriage but said nothing about delegation. At the time of the marriage I was at our cemetery with a funeral, but my assistant prepared the chalice and the vestments for the nuptial Mass and assisted in the sanctuary at the marriage. Is the marriage valid?

SCRUTATOR

The difficulty in the case proposed turns about the distinction between implicit and tacit delegation. Canon 1096, § 1, requires that the delegation for marriage be express.[1] The circumstances of the case would lead one to believe that no express delegation was given in spite of the fact that every one involved was agreed that the visiting bishop was most welcome in the performance of the marriage ceremony. The fact that it would outrage common sense to conclude that the visiting bishop was not expressly delegated for the marriage because no authorised person said to him or wrote to him in precise language that he was so delegated is strong reason for supposing that explicit delegation is not required.

Of course, silence does not give consent in this case. Tacit delegation is not sufficient. Resistance can be passive. However, there is a great deal more than mere silence or passivity in the circumstances surrounding the actions of the persons competent to delegate the visiting bishop. Even the activity of the assistant would be sufficient for delegation, supposing that he was, in accordance with the faculty of Canon 1096, § 1, delegated by the pastor or the local Ordinary for the marriages of the parish. Perhaps the mere assistance in the sanctuary might be construed as mere passivity, but not the preparation of the chalice and the vestments. Indeed, the letter of the bishop of the diocese in which the marriage occurred came as near an explicit delegation as is possible without the use of the word "delegate" itself. The fact that he permitted the parties to invite the visiting bishop was nothing if it was not an invitation extended through the parties.

But the doubt engendered by the circumstances of the case reveals the importance of written delegation expressed in precise terms.

[1] Licentia assistendi matrimonio concessa ad normam can. 1095, § 2, dari expresse debet sacerdoti determinato ad matrimonium determinatum, exclusis quibuslibet delegationibus generalibus, nisi agatur de vicariis cooperatoribus pro paroecia cui addicti sunt; secus irrita est.

BIZARRE PICTURES

In my deanery there is a pastor who is somewhat of an artist. His parish is located in the heart of a Baptist population. In the hope of making conversions he has hung in the vestibule of his church a painting of the Blessed Virgin hovering over a baptismal ceremony suggestive of that conducted by the Baptists. In a pamphlet describing the picture he explains that his desire was to show the Baptists that the Blessed Virgin is their protectress and that her prayers will bring them back to the true Church. Is this picture proper?

CENSOR

It pertains to the local Ordinary to determine whether or not a picture may be exhibited in his diocese. Of course, vigilance in this matter is a duty of the rural dean.[1] The judgment of the local Ordinary in regard to pictures is authorized and required by Canon 1385, § 1, 3° and Canon 1279, §§1-3.[2] Indeed, according to Canon 1399, 12°, some pictures are *ipso iure* forbidden.[3] The picture described would seem to be of the kind forbidden. Certainly, the dean should report its existence to the local Ordinary.

PAROCHIAL DONATION TO TEACHING SISTERS

I am besieged by letters sent me by the pastor who succeeded me in a parish in which I was vicar econome. In these letters he demands that I repay the parish the sum of five hundred dollars which I paid the Sisters who taught in the parish school. This sum was in excess of the amount of their salaries as determined by diocesan regulations. The pastor who preceded me had been accustomed to pay them this amount to cover their summer expenses, and I

[1] Canon 447, § 1. Vicario foraneo . . . ius et officium est invigilandi . . . 4° Num decor et nitor ecclesiarum et sacrae supellectilis, maxime in custodia sanctissimi Sacramenti et in Missae celebratione, accurate servetur; . . .

[2] Canon 1279, § 1. Nemini liceat in ecclesiis, etiam exemptis, aliisve locis sacris ullam insolitam ponere vel ponendam curare imaginem, nisi ab Ordinario loci sit approbata.

§ 2. Ordinarius autem sacras imagines publice ad fidelium venerationem exponendas ne approbet, quae cum probato Ecclesiae usu non congruant.

§ 3. Nunquam sinat Ordinarius in ecclesiis aliisve locis sacris exhiberi falsi dogmatis imagines vel quae debitam decentiam et honestatem non praeseferant, aut rudibus periculosi erroris occasionem praebeant.

Canon 1385, § 1, 3°. Nisi censura ecclesiastica praecesserit, ne edantur etiam a laicis: . . . Imagines sacrae quovis modo imprimendae, sive preces adiunctas habeant, sive sine illis edantur.

[3] Canon 1399, 12° Ipso iure prohibentur: Imagines quoquo modo impressae Domini Nostri Iesu Christi, Beatae Mariae Virginis, Angelorum atque Sanctorum vel aliorum Servorum Dei ab Ecclesiae sensu et decretis alienae.

was but following in his tradition. The Superior General told me that in some parishes the Sisters were permitted to hold raffles or entertainments to raise this sum, but that my predecessor was opposed to this, and preferred to give them a lump sum. Am I obliged to make restitution of the sum I thus paid?

LAQUEO CAPTUS

An administrator of a parish, according to Canon 473, § 1, is bound by the same juridical restrictions as a pastor. Now a pastor is permitted to make only moderate donations according to local custom, except in the case in which the gift is not entirely gratuitous but is given in consideration of services or under a duty of piety or charity.[1] But even in the latter case, where the donor is of a rank subordinate to that of the local Ordinary, he is restricted by Canon 1527, § 1, under which acts of extraordinary administration require the written sanction of the local Ordinary.[2] Indeed, any special collection, and *a fortiori*, the holding of a raffle, or, in case of notable profit, the staging of an entertainment, seem to be acts of extraordinary administration, at least as to their method. For them, then, the written permission of the local Ordinary would seem to be necessary.

This conclusion is the more apparent from the circumstances of the present case in which the obvious will of the local Ordinary is defeated by stratagems. If his regulations do not afford the Sisters an adequate annual income, remedies are to be suggested to him. If he still believes that his schedule of salaries is adequate, recourse lies to higher authority. But surely he is not to be thwarted by intrigue on the part of those who owe him obedience and respect.

One sympathizes with the administrator in the case herein described, especially since he had every reason to presume that the pastor who preceded him, as well as the pastors who permitted raffles and entertainments, were acting lawfully. Perhaps they did have the written permission of the local Ordinary, though it seems unlikely. If they did, his action seems lawful and valid in view of the fact that the written permission given his predecessor would

[1] Canon 1535. Praelati et rectores de bonis mobilibus suarum ecclesiarum donationes, praeterquam parvas et modicas secundum legitimam loci consuetudinem, facere ne praesumant, nisi iusta interveniente causa remunerationis aut pietatis aut christianae caritatis; secus donatio a successoribus revocari poterit.

[2] Canon 1527, § 1. Nisi prius ab Ordinario loci facultatem impetraverint, scriptis dandam, administratores invalide actus ponunt qui ordinariae administrationis fines et modum excedant.

hardly have been granted exclusively *propter industriam personae.*

Of course, if the local Ordinary, in the statutes of the Diocese, fixes the sum which a pastor may spend without recourse to him, a gift could be made within that limit and according to the terms of canon 1535.

In any event, the donation can be ratified by the local Ordinary, if he is disposed to act. If not, it is obviously the Sisters who are primarily liable, in the absence of recourse to higher authority. Of course, the administrator can not escape secondary liability.

JEROME D. HANNAN

THE PURCELL CASE

From the statements contained in the opinion of the Supreme Court of Ohio (Mannix vs. Purcell, 46 Ohio St., 102), it appears that Father Edward Purcell, brother of Archbishop Purcell, of Cincinnati, had for many years (from 1837-1879) been receiving deposits from individual Catholics, who preferred to trust him as their banker rather than deposit their funds in the banks. The canon laws of the Church forbade this to be done by an ecclesiastic. Father Purcell, however, acted with the consent of his brother, in the matter, and the latter, in his individual capacity, assumed the entire indebtedness. Both made assignments to Mannix early in 1879, and the claims . . . amounted to about $2,500,000.00. It was sought to charge two hundred pieces of church property in the Cincinnati archdiocese with the unpaid portion of this indebtedness. The title to this property was in John B. Purcell, the archbishop, in fee simple; but the supreme court admitted parol testimony and the canons and decrees of the Catholic Church regulating the manner of acquiring and holding church property, as competent evidence to show that Archbishop Purcell held this property in trust for religious and charitable purposes. It was held that the property as held in trust by the Archbishop did not pass to his assignee in solvency for the payment of his individual debts, . . . —Desmond, *The Church and the Law,* p. 103.

SEMINARIAN'S RECORD*

Name ..... Address ..... Parish .....
Last First Second

Baptismal certificate ☐
Confirmation certificate ☐

Marriage certificate ☐
Marriage date .....
Birth date .....

Birth place .....

Doctors Exam ☐
Date .....
Date .....

Agreement ☐

Attending seminary:
1) ..... from (date) .....
2) ..... from (date) .....
3) ..... from (date) .....

Testimonial letters for acceptance:
Pastor ☐
School record ☐

Bishop
Origin ☐
Domicile 1) ☐
Domicile 2) ☐

Religious ☐
Dispensation ☐
(*date*) .....

Seminary ☐

Oaths
Perp. residence ☐
Service in diocese ☐

Profession of Faith
Sub-deacon (date) ..... ☐
Priesthood (date) ..... ☐

Annual test. of pastor (date)
19..... 19.....
19..... 19.....
19..... 19.....
19..... 19.....

ORDERS	Test. on Studies	Test. on Exam	Test. of Rector	Test. of Bishop of Dom.	Petition and Declaration (Date)	Publication (Date - Place)	Retreat (Date)	Dimissorials (Date)	Ordination (Date)	Dispensations	
										Needed	Date Obtained
Tonsure					P	x x x					
Qsiariate					P	x x x					
Lectorate					P	x x x					
Exorcist.					P	x x x					
Acolyth.					P	x x x					
Subdiaconate					PD						
Diaconate					PD						
Priesthood					PD						

* Prepared by Rev. Thomas J. Feeney, J.C.D., Davenport, Iowa.

Decrees and Decisions

CANONICAL

New Constitution on Papal Elections

Some thirty-five pages of the *Acta Apostolicae Sedis*, comprising the whole of the third number for 1946,[1] are devoted to the new Constitution on Papal Elections, *Vacantis Apostolicae Sedis*, issued December 8, 1945, repealing the Constitution of Piux X of December 25, 1904, *Vacante Sede Apostolica*, the first of the *Documenta* inserted at the end of *The Code of Canon Law*.

The new Constitution is structurally built on the previous one as the same two Titles are found in both, as well as the same five Chapters in the first Title and the same seven Chapters in the second Title.

The first Title is "De Sede Apostolica Vacante"; the second, "De Electione Romani Pontificis". The Chapters under the first Title are "De potestate S. Collegii Cardinalium, Sede Apostolica vacante"; "De Cardinalium Congregationibus"; "De nonnullis peculiaribus officiis, Sede Apostolica vacante"; "De Sacris Romanis Congregationibus *et Tribunalibus* eorumque facultatibus Sede Apostolica vacante";[2] "De exsequiis Romani Pontificis". The Chapters under the second Title are "De electoribus Romani Pontificis"; "De Conclavistis ac de aliis in Conclavi partem habentibus"; "De ingressu in Conclave"; "De clausura Conclavis, ac de secreto servando in iis omnibus quae in Conclavi aguntur";[3] "De forma electionis"; "De iis, quae servanda vel vitanda sunt in electione Romani Pontificis"; "De acceptatione et proclamatione electionis nec non de consecratione et coronatione novi Pontificis."

It is in Chapter V of the second Title, "De forma electionis", that the most noteworthy innovation in the new Constitution occurs. The election of the Pontiff *per scrutinium* is regulated by rules contained in §§ 68-89, corresponding to §§ 57-77 of the previous Constitution. In § 68 the present Constitution inserts the new require-

[1] *AAS*, XXXVIII (1946), 65-99.

[2] Italicized words are new.

[3] In the new Constitution a comma is omitted between "omnibus" and "quae", though it appeared in the title of Chapter IV in the previous Constitution.

ment that for the election of the Supreme Pontiff one vote more than two-thirds of those of the Cardinals voting is required. This fundamental change is accompanied by other modifications. In § 70 the pre-balloting acts are listed as four instead of five (as in § 59 of the previous Constitution); § 72 takes the place of § 61 of the previous Constitution as to the form of the ballot, requiring that it be wider than long and that on the face of it there be printed, or handwritten by one and the same person, the words: " Eligo in Summum Pontificem Reverendissimum Dominum meum D. Cardinalem . . ."; § 74 requires the departure from the chapel of all except the Cardinals before the Cardinals commence writing the names of the candidates on their ballots; § 75 then indicates that the form just noted be filled out with the name of a Cardinal written with a style somewhat different from the voting Cardinal's ordinary style; § 76 provides for the folding of the ballot in the middle, in such a way that folded it should have approximately the width of a thumb. § 75 thus provides for a much simpler method of filling in the face of the ballot. Under § 63 of the previous Constitution, besides the name of the candidate voted for, the voting Cardinal was required to fill in his own name above that of his candidate and under the latter a number with a verse of Scripture or some other motto. This procedure was important under the previous Constitution which in § 75 (corresponding to § 86 of the present Constitution) required that if the elected Pontiff obtained exactly two-thirds of the votes, his own ballot should be opened to ascertain whether he had voted for himself, in which case his election would be invalid. His ballot could be identified by his seal on the outside of the ballot and by his name and motto written inside. This provision is not incorporated in the present Constitution. The additional vote in excess of two-thirds makes ample provision for the contingency that a Cardinal would cast an invalid vote in voting for himself. In spite of that action, he would have the two-thirds of the votes of the voting Cardinals required for the validity of his election.

Another new provision is that which forbids the use of apparatus for transmitting or photographing the proceedings. The introduction of this sort of apparatus is forbidden in a new paragraph, § 64. Another new section, § 87 commands that the Cardinals surrender for burning with the ballots all memoranda they have made with regard to the outcome of the respective ballotings. The holding

of the Conclave outside Rome, if circumstances require it, is provided for in a new paragraph also, § 8.

Other new paragraphs provide as follows: § 23, the civil government of Vatican City pertains to the Sacred College during the vacancy of the Holy See, but laws can be enacted only in an urgent case and need ratification by the new Pontiff to be effective after his election; § 30, authentic documents of the burial of the deceased Pope are to be drawn up (the method is indicated in detail); § 31, the Sacred College is to provide for the bringing of the body of the deceased Pope to the Vatican Basilica of St. Peter, should the Pope die outside Rome; § 42 reproduces rules for the garb of the Cardinals during the vacancy of the Holy See, citing in a footnote the norms of January 6, 1943, of the Sacred Congregation of Ceremonies; § 91 provides that the formalities laid down for the election of the Supreme Pontiff are effective even in the case in which the vacancy of the Holy See is owing to the resignation of the Pope; § 102 provides for an authentic document attesting the acceptance of the election and the name assumed by the elected Pontiff; § 103 adds to § 89 of the previous Constitution provisions for the twofold "adoratio" of the Cardinals and the Blessing *Urbi et Orbi;* § 104 refers to the Roman Ceremonial for the norms to be followed in the case in which the elected Pontiff resides outside the Conclave; § 105 provides for the opening of the premises of the Conclave, the drawing up of an authentic document referring to this fact, and the admission of those who customarily are allowed to offer their homage to the newly elected Pontiff; and § 106 provides for the third "adoratio" at a time fixed by the newly elected Pontiff.

There are 108 numbered paragraphs in the new Constitution, while there were 91 in the previous one. In reality there are nineteen new paragraphs, but two of the previous Constitution have been omitted: §§ 32 and 65, the former excluding from voting a Cardinal who was not "saltem in Diaconatus ordine" and the latter providing for the sealing of the ballots with wax and an extraordinary seal of the respective Cardinals.

Cross references to the Code are found in the footnotes, references obviously new in view of the fact that the Code was promulgated later than the former Constitution. Such references are those to canon 219 in § 101 in regard to the moment at which the elected Pontiff obtains jurisdiction; to canon 229 in § 33 in regard to the suspension of a General Council on the death of a Pope; to

canon 233, § 1, in § 35 in regard to the moment at which a Cardinal is given the right of electing the Supreme Pontiff; to canon 239, § 2, in § 107 in regard to the ordination or the consecration of an elected Pontiff who needs either one; and to canon 239, § 3, in regard to the announcement of the name of the elected Pontiff to the people.

Cross references are found also to documents of Pius XI. The Motu proprio *Cum proxime* (March 1, 1922)[4] is cited in § 12, d) in regard to the determination by the Cardinals of those days which shall be held to be the first six of the nine days for the funeral exequies of the deceased Pope; in § 37 in regard to the extension of the time during which the arrival of Cardinals is to be awaited from ten (as in the previous Constitution) to fifteen days, with the faculty granted the Sacred College to extend even that period for two or three days, the whole period not to exceed eighteen days in any event; in § 43 permitting a Cardinal to bring one or two servants into the Conclave with him, one a layman; and in § 65 in regard to the privilege of the Cardinals of celebrating Mass instead of merely receiving Holy Communion.

A formula for the oath of the Custodian of the Conclave is appended as a footnote to § 52. Modifications have been made in the formulae of the oaths of the Cardinals and the Conclavists: the latter are required to swear, as have been the Cardinals, that they will in no way cooperate with the exercise of the *Veto;* moreover they are required also to aver that they will not use apparatus for transmitting the oral deliberations of the Conclave or for photographing the proceedings.

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Revised Pages of *Pagella* of Bishops' Faculties

June 29, 1946

Your Excellency:

The Supreme Sacred Congregation of the Holy Office has made certain modifications in the Quinquennial Faculties granted the Most Reverend Ordinaries, particularly—as announced in my circular letter No. 153/46 of May 19, 1946—in regard to dispensation from the matrimonial impediment *disparitatis cultus cum parte judaica.*

I now take pleasure in sending a sheet of revised pages for insertion in the *pagella* of the Index of Quinquennial Faculties. These

[4] *AAS,* XIV (1922), 145; Bouscaren, *The Canon Law Digest,* I, 141.

new pages are to be substituted for pages 3, 4, 5, and half of page 6, i.e., down to:

"2

"Ex S. Congregatione de disciplina Sacramentorum" of the old *pagella*.

As stated in the circular cited, the above-mentioned faculty ("cum parte judaica") will go into effect on July 1, 1946. Furthermore, as already communicated by my circular No. 97/44 of March 25, 1944, the Quinquennial Faculties for all the Most Reverend Ordinaries of the United States have been extended to the end of the year 1949.

With sentiments of highest esteem and every good wish, I remain

Sincerely yours in Christ,

✠ A. G. Cicognani,
Archbishop of Laodicea,
Apostolic Delegate

[The revised pages are as follows.]

Ex Suprema S. Congregatione S. Officii

1. Concedendi, non ultra triennium, licentiam legendi ac retinendi, sub custodia tamen ne ad aliorum manus perveniant, libros prohibitos et ephemerides, exceptis operibus haeresim vel schisma ex professo propugnantibus, vel etiam ipsa religionis fundamenta evertere nitentibus nec non operibus de obscoenis ex professo tractantibus, singulis christifidelibus sibi subditis, nonnisi tamen cum delectu et iusta ac rationabili causa (cfr. can. 1402, § 2, *Cod. I. C.*), iis scilicet tantum, qui eorumdem librorum et ephemeridum lectione sive ad ea impugnanda sive ad proprium legitimum munus exercendum, vel iustum studiorum curriculum peragendum, vere indigeant.

Adnotantum.—*Recensita facultas Episcopis conceditur per se ipsos personaliter exercenda, seu nemini deleganda; et graviter onerata ipsorum conscientia super reali omnium memoratarum conditionum concursu.*

2. Dispensandi, iustis gravibusque accendentibus causis, cum subditis etiam extra territorium, aut non subditis intra limites proprii territorii, super impedimento mixtae religions, et, si casus ferat, etiam super disparitate cultus, ad cautelam; quoties prudens du-

bium oriatur de collatione baptismi partis acatholicae; quatenus ante nuptias pars acatholica ad veram religionem adduci aut catholica ab ipsis nuptiis absterreri nequiverit, dummodo prius regulariter, ad praescriptum *Cod. I. C.* can. 1061, § 2, cautum omnino sit conditionibus ab Ecclesia requisitis, et *ipse Excmus P. D. Ordinarius moraliter certus sit easdem impletum iri,* scilicet: ex parte nupturientis acatholici de amovendo a parte catholica perversionis periculo, et ab utroque contrahente de universa prole utriusque sexus in catholicae religionis sanctitate omnino baptizanda et educanda; declarata insuper parti catholicae obligatione, qua tenetur, prudenter curandi conversionem coniugis ad fidem catholicam.

Nupturientes autem moneantur se, ante vel post matrimonium coram Ecclesia initum, ministrum quoque acatholicum ad matrimonialem consensum praestandum vel renovandum adire non posse, ad mentem *Cod. I. C.* can. 1063, § 1, sub poena excommunicationis latae sententiae Ordinario reservatae a parte catholica incurrendae, iuxta can. 2319, § 1, n. 1°, stricte caeteroquin servatis quae de parochi in casu agendi ratione statuta sunt in can. 1063, § 2.

Quod si partes actu in concubinatu vivant, provideatur opportunis modis ut scandalum, si adsit, removeatur et pars catholica ad gratiam Dei recipiendam rite disponatur, praevia eius absolutione ab excommunicatione contracta, si forte matrimonium attentatum fuerit coram ministro acatholico, eique impositis congruis poenitentiis salutaribus; si autem ex illicita unione iam nata sit proles, partes moneantur de gravi obligatione iuris divini curandi, pro posse, eius catholicam educationem et (si casus ferat) conversionem, baptismum; a parte autem catholica exquiratur huius obligationis implendae explicita promissio.

3. Dispensandi, iustis gravibusque accendentibus causis, cum subditis etiam extra territorium, aut non subditis intra limites proprii territorii, super impedimento disparitatis cultus (excepto tamen casu matrimonii cum parte mahumetana); quatenus sine contumelia Creatoris id fieri possit et ante nuptias pars non baptizata ad veram religionem adduci aut catholica ab ipsis nuptiis absterreri nequiverit, dummodo prius regulariter, ad praescriptum *Cod. I. C.* can. 1061, § 2, cautum omnino sit conditionibus ab Ecclesia requisitis, et *ipse Excmus P. D. Ordinarius moraliter certus sit easdem impletum iri,* scilicet: ex parte nupturientis non baptizati de amovendo a parte catholica perversionis periculo et ab utroque contrahente de universa prole utriusque sexus in catholicae religionis

sanctitate omnino baptizanda et educanda; declarata insuper parti catholicae obligatione, qua tenetur, prudenter curandi conversionem coniugis ad fidem catholicam.

Nupturientes autem moneantur se, ante vel post matrimonium coram Ecclesia initum, ministrum quoque falsi cultus ad matrimonialem consensum praestandum vel renovandum adire non posse, ad mentem *Cod. I. C.* can. 1063, § 1; stricte caeteroquin servatis quae de parochi agendi ratione in casu statuta sunt in can. 1063, § 2. Quod vero attinet ad legitimationem prolis, prae oculis habeatur can. 1051.

Quod si partes actu in concubinatu vivant, provideatur opportunis modis ut scandalum, si adsit, removeatur et pars catholica ad gratiam Dei recipiendam rite disponatur; si autem ex illicita unione iam nata sit proles, fiat monitio et exigatur promissio ut supra, n. 2.

In reliquis, quod refertur ad publicationes, interrogationes de consensu et sacros ritus, sive agatur de impedimento mixtae religionis sive disparitatis cultus, serventur praescripta *Cod. I. C.* cann. 1026, 1102, 1109; et huiusmodi nuptiis celebratis, sive in proprio, sive in alieno territorio, R. P. D. Ordinarius invigilet ut coniuges promissiones factas fideliter impleant.

4. Sanandi in radice matrimonia attentata coram officiali civili vel ministro acatholico a suis subditis etiam extra territorium, aut non subditis, intra limites proprii territorii, cum impedimento mixtae religionis aut disparitatis cultus, dummodo consensus in utroque coniuge perseveret, isque legitime renovari non possit, sive quia pars acatholica de invaliditate matrimonii moneri nequeat sine periculo gravis damni aut incommodi a catholico coniuge subeundi; sive quia pars acatholica ad renovandum coram Ecclesia matrimonialem consensum, aut ad cautiones praestandas, ad praescriptum *Cod. I. C.* can. 1061, § 2, ullo modo induci nequeat; dummodo:

1° moraliter certum sit partem acatholicam non esse impedituram baptismum et catholicam educationem universae prolis forte nasciturae;

2° pars catholica explicite promittat se, pro posse, curaturam esse baptismum et catholicam educationem universae prolis forte nasciturae, et (si casus ferat) etiam conversionem, baptismum, catholicam educationem prolis iam natae;

3° partes, ante attentatum matrimonium, sive privatim sive per publicum actum, se non obstrinxerint ad educationem acatholicam prolis;

4° neutra pars sit actu demens;

5° pars saltem catholica sit sanationis conscia eamque petat;

6° nullum aliud obstet canonicum impedimentum dirimens, super quo Ipse Ordinarius dispensandi aut sanandi facultate non polleat.

Ipse autem Excmus Episcopus P. D. serio moneat partem catholicam de gravissimo patrato scelere, salutares ei poenitentias imponat et, si casus ferat, eam ab excommunicatione absolvat iuxta C. I. C. can. 2319, § 1, simulque declaret ob sanationis gratiam a se acceptam, matrimonium effectum esse validum, legitimum et indissolubile iure divino, et prolem forte susceptam vel suscipiendam, legitimam esse, eique insuper in mentem revocet obligationem qua tenetur prudenter curandi conversionem coniugis ad fidem catholicam.

Cum autem de matrimonii validitate et prolis legitimatione in foro externo constare debeat, Excmus P. D. Episcopus mandet ut singulis vicibus documentum sanationis cum attestatione peractae executionis diligenter custodiatur in Curia locali, nec non curet, nisi pro sua prudentia aliter iudicaverit, ut in libro baptizatorum paroeciae, ubi pars catholica baptismum recepit, transcribatur notitia sanationis matrimonii, de quo actum est, cum adnotatione diei et anni.

Mens autem S. Officii est ut Episcopus hanc facultatem sanandi matrimonia in radice per se ipse personaliter exerceat, scilicet nemini subdeleget.

ADNOTANDA.—1. *In singulis praefatis sive sanationibus sive dispensationibus concedendis, Episcopus vel Ordinarius expressam faciat mentionem Apostolicae delegationis* (*Cod. I. C.* can. 1057).

2. *Ordinarius in fine cuiuslibet anni referat ad S. Congregationem S. Officii de numero et specie dispensationum vigore praesentis Indulti elargitarum.*

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INDULT AFFECTING EUCHARISTIC FAST OF NIGHT WORKERS

July 26, 1946

Your Excellency:

On February 8, 1946, in behalf of the Most Reverend Ordinaries of the United States, I sent the following petition to the Sacred Congregation of the Sacraments:

"Metropolitae, Episcopi necnon alii Ordinarii locorum Foederatorum Americae Septentrionalis Statuum, humiliter postulant benignam facultatem dispensandi a naturali ieiunio fideles habitualiter post mediam noctem laborantes, ut ipsi, abstinendo a cibis solidis per quatuor horas, et a potu per unam horam, et dummodo potus post mediam noctem sumptus non-alchoolicus sit, SS.am Communionem Eucharisticam recipere valeant ex devotione, remoto quocumque scandalo et admiratione."

I am now happy to communicate that H. E. Cardinal Jorio, Prefect of the S. C. of Sacraments, has commissioned me to announce that His Holiness, in an audience of May 27, 1946, deigned to grant this faculty to the Most Reverend Ordinaries of the respective dioceses *for a period of three years,* under the following conditions:

1. The Most Reverend Ordinaries, in granting dispensations under this faculty, must proceed in a way that is certain and determinate, not leaving the use of this privilege to the judgment of the faithful;
2. The dispensation may be given for Sundays and Feasts of Precept and for one other day during the week as the devotion of the individual communicant may dictate; furthermore, in the case of nursing Sisters dispensation may be granted for *daily* Communion whenever the previous night has been spent in service of the sick.
3. At the expiration of the faculty, a report is to be made to the said Sacred Congregation on the use of the faculty and on its advantages and possible disadvantages.

The relative tax to be remitted to the Sacred Congregation is in the amount of Five Dollars ($5.00) for each diocese, and may be sent to this Apostolic Delegation for forwarding.

With sentiments of highest esteem and with every good wish, I remain

Sincerely yours in Christ,

✠ A. G. Cicognani,
Archbishop of Laodicea,
Apostolic Delegate

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Canonization

On June 13 a semi-public consistory was held at which the last formal step was taken in the process of the canonization of Mother Frances Xavier Cabrini, Blessed Elizabeth Bichier des Ages, Blessed Bernardino Realino, S.J., and Blessed John de Britto, S.J. The action was the approval by open ballot of their canonization. July 7 was the date formally set for the ceremonies of canonization. Mother Cabrini's Feast is set for December 22, the date of her death.

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Excommunication

Rev. Ferdinando Tartaglia of the Archdiocese of Florence has been declared " excommunicatus vitandus " for propagating false doctrine.

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Vicariate Apostolic of the Caroline Islands

According to an announcement of the Sacred Congregation for the Propagation of the Faith, parts of the Mariana Archipelago which have been subject to the Vicariate Apostolic of the Mariana, Caroline and Marshall Islands, have been joined to the Vicariate Apostolic of Guam, and placed under the Apostolic Delegate of the United States. Rev. Vincent J. Kennally, S.J., of the New York Province, has been named Apostolic Administrator of the Caroline and Marshall Islands.

SECULAR

" Equal Rights " Amendment

On July 19 the " Equal Rights " Amendment reached the floor of the Senate for the first time in twenty-three years and was defeated 38-35.

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Subversive Use of School Auditoriums

The Supreme Court of California has rendered void a statute providing that a school auditorium may not be used for a public meeting unless the sponsors sign an affidavit stating that they do not advocate and are not affiliated with an organization advocating the overthrow of the government by violence, though a State is not compelled, the decision avers, to make school buildings available for public meetings.

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Ku Klux Klan in New York

The Supreme Court of New York has revoked the New York Charter of the Ku Klux Klan. Violators of its order are liable to a fine of $10,000 and an imprisonment not exceeding six months.

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Credits for Released Time

The New York State Department of Education, through Lewis A. Wilson, acting State Commissioner of Education, dismissed a protest filed by a clergyman of the Old Catholic Church in America, Rev. Gregory Reynolds, who alleged that the granting of credits for religious education given on released time constituted a violation of the State constitution barring religious education in public schools.

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Presidential Commission on Higher Education

Two of the thirty members of the Presidential Commission on Higher Education are Catholics: Very Rev. Frederick G. Hochwalt, Director of the Education Department of the National Catholic Welfare Conference, and Dr. Martin R. P. McGuire, Dean of the Graduate School of Arts and Sciences of The Catholic University of America.

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Surplus Property Purchases

A forty per cent discount on purchases from the War Assets Administration has been made available to health institutions which present a discount certificate signed by the Office of Surplus Property Utilization, U. S. Public Health Service, and to educational institutions which present a letter of authority to purchase, stamped with the certification symbols assigned to them by the State Educational Agencies for Surplus Property and approved by the U. S. Office of Education. Non-profit welfare institutions, though not entitled to the discount, can make on-the-spot purchases, provided they have certificates issued by the Surplus Property Utilization Division, Bureau of Public Assistance, Social Security Board.

Iowa Bus Ruling

District Judge Harry Narey of Spirit Lake, Iowa, in an opinion jeopardizing the right to State subsidy of school districts which previously have maintained their own bus transportation, carrying to parochial schools children who lived along the bus route, held in reply to a request of the Silver Lake Consolidated School District for a declaratory judgment permitting the continuance of this practice, that a parochial school is a ministry of the church and that therefore granting it subsidy in the form of bus transportation of its pupils would be a violation of the State Constitution.

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Arabs In Rome

His Holiness received in private audience five members of the Supreme Arab Committee of Palestine, who are said to have communicated to him the Arab viewpoint on the situation in the Holy Land, and to have received the assurance of the willingness of the Holy Father to use all means within his power to see that justice and peace prevail in Palestine.

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Occupied Germany

Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, serving as liaison between the Catholic Church authorities and the American Military Government in Germany, has been appointed Military Vicar Delegate for the American armed forces in Germany.

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Canon Picard de la Vacquerie has been made a Bishop and named to serve with the rank of general as Catholic religious affairs inspector in a liaison post between the French Army and the Catholic Church in the French Zones of Occupation in Germany and Austria.

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Msgr. Richard L. Smith, of Carlisle, England, has been named comptroller of the General Religious Affairs branch in the Military Government of the British Zone in Germany.

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The German Hierarchy has referred to the Holy See information received during the recent Fulda meeting indicating that the Allied

occupational authorities do not recognize the Concordats made by the Holy See with the former Reich Government and the individual German States, though they are willing to be guided in practice by the provisions of the Concordat, a situation fraught with uncertainty for the Hierarchy, especially in regard to the maintenance of parochial schools and State taxes and subsidies guaranteed under the Concordats.

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Peter's Pence collections in Germany were for a time blocked by the Office of Military Government, acting on an interpretation of the financial division of the United States section of the Allied control council, which held that since it was money destined for a foreign national, it might have to be accounted for under reparation titles. Only 300 marks a month were permitted to be paid to the Holy Father's representative in Germany. After the withdrawal of this ruling, our Holy Father's wish determined that the money should be placed at the disposal of the Apostolic Nunciature in Eichstaett for use inside Germany.

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Dr. James M. Eagan, associate professor of history in the College of New Rochelle, New York, and Vice President of the Catholic Association for International Peace, has been appointed by the War Department as chief specialist officer of the education and religious affairs section of the Allied Military Government, with duties centering particularly around the reorganization of private schools in Germany and the promotion of a wider circulation of religious literature.

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A camp seminary, established in a German prisoner-of-war camp, near Colchester, England, with the approval of the Apostolic Delegate and the British military authorities, has prepared one hundred prisoners for ordination.

Six hundred prisoners are being similarly prepared in a French Army camp. Dr. Balduin V. Schwarz, of Manhattan College, is collecting German text books for them, for distribution through War Relief Services of the National Catholic Welfare Conference.

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In France, the National Syndicate of Teachers has urged the new Constituent Assembly to refuse to include liberty of education

in the new constitution and has demanded that the Ministry of Education be placed under the control of a man known for his attachment to secular laws. A similar campaign has been undertaken by the League for the Rights of Man, which held its annual congress in Lyon in early summer.

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An enactment of the Spanish Cortes provides that all business and industrial establishments planning new factories must furnish homes for their employes, if they number more than fifty, and in every case in which the factory is established at a distance from a population center. State loans for the construction of low price homes are made available. 360,000 homes are estimated as the national need.

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Six Catholics have portfolios in the new Dutch Cabinet formed by Premier Louis Beel, member of the Catholic People's Party; the Cabinet includes four Labor Ministers and three non-party Ministers.

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Five Catholic priests, members of the Catholic People's Party, including Msgr. Jan Sramek, its leader, have been elected to the new Czecho-Slovak Parliament.

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Dean Acheson, Acting Secretary of State, replying to the alleged complaint of Poland's President, Boleslaw Beirut, that United States Ambassador to Poland, Arthur Bliss Lane, was either unable or unwilling to understand the problems of the Polish people and was distrustful of Polish assurances of their desire for cordial relations with the United States, averred that the Ambassador continued to enjoy the complete confidence of the United States Government.

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Karol Popiel, Chairman of the Party of Labor and Christian Trade Unions in Poland, charges that the Prime Minister Osobka-Morawski made the holding of its congress on July 19 dependent on its approving a single electoral slate. This was refused and the members of the party were told to desist from political activity until there is a change in the government's attitude.

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An agency for the defense of the civil rights of Catholics has been set up in Budapest under the sponsorship of a group of Catholic lawyers and named in honor of Cardinal Pazmany.

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The Ministry of Interior Affairs in Hungary has dissolved the Young Catholic Farmers organization, the Christian Social Circle of Budapest, the Association of Christian Social Employees of Tobacco Factories, and the Union of Catholic Girls. It has also dissolved and confiscated the property of the Union of Catholic University Students.

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The Hungarian Minister of Education has announced that Catholic schools will be supervised by committees appointed by the government, thus ending the autonomy of teaching and administration enjoyed by the former since 1934.

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Nearly nine million pounds of canned food have been shipped to starving people of Europe and the Far East by NCWC War Relief Services from warehouses in New York, the result of the campaign conducted in 15,000 parishes of the United States. Rev. Michael McKilliop, Maryknoll missioner, and representative of the War Relief Services, is attempting to work out with the American military government in Japan an agreement permitting voluntary relief agencies to assist the Japanese. A half million pounds of clothing has been similarly distributed.

It has made eleven shipments to Germany to date, four million pounds of relief materials, mostly food, including 800,000 pounds of flour. 16 motor trucks have been delivered to Germany by its agency in France. Distribution of supplies in Germany will be made through the Caritas Verband, with the approval of the authorities of the American and the British Zones of Occupation.

$60,000 contributed by the Society of St. Vincent de Paul to War Relief Services of the National Catholic Welfare Conference for relief work through its branches in foreign countries has been allocated in equal amounts to Italy, Germany, and Poland.

A shipment of 750 tons of food was sent to Budapest in middle August with the purpose of meeting the needs of 15,000 persons through "Charity Kitchens of American Catholics" established

with the cooperation of the Charity Center of Actio Catholica under the direction of Joseph Cardinal Mindszenty, Primate of Hungary.

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The Social Action Department of the National Catholic Welfare Conference issued a Labor Day statement warning against vengeful anti-labor legislation, while condemning labor racketeering, which, however, it maintained was not typical of the labor movement. It encouraged organized labor to extend its activities beyond the traditional limits of collective bargaining over wages, hours and working conditions into the field of labor-management cooperation and eventually into an organized system of industry councils, advocating to this end an early meeting on a national scale of freely chosen representatives of organized labor, management, agriculture and the professions.

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Dr. Mariano Ospina Perez, the new President of Colombia, in an interview in a weekly published at Bogota, has expressed his plans to govern according to the principles of the papal social encyclicals.

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The July issue of "Heart", a weekly published by the Society of Jesus, was confiscated by Hungarian Minister of Interior Affairs.

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William C. Smith, assistant executive secretary of the National Council of Catholic Men, has been appointed radio director in charge of the Catholic Hour and the Hour of Faith.

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Thirty American colleges and universities have granted fifty-nine four-year scholarships to Chinese students.

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Courtenay Savage, who had gone to Europe as correspondent for the National Catholic Welfare Conference's News Service, died in Rome in late August.

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Reviews of Periodicals

Revista Española de Derecho Canónico

A new center of advanced canonical studies has been founded by the Spanish Government (decree of April 29, 1944) under the name of *Instituto de Derecho Canónico "San Raimundo de Peñafort"* and affiliated with the Canon Law School of the Pontifical University of Salamanca. Its purpose is the fostering of scholarly research in the law of the Church universal as well as in the specifically Spanish contributions to, and aspects of, Canon law. The Most Rev. Francisco Barbado Viejo, O.P., Bishop of Salamanca, is the director of the Institute. Inaugurated on the feast of its patron Saint, January 23, 1945, the Institute organized in the first year of its existence a convention of Spanish canonists (September 2-6, 1945) with a stimulating program of lectures and discussions. Among the projects sponsored by the new Institute a critical edition of the *Collectio Hispana* holds the first place. This outstanding document by which seventh-century Spain contributed to the consolidation of Western Canon law will be entrusted to the care of Dr. A. Ariño Alafont, whose first preliminary study on the subject appeared some years ago (*Colección Canónica Hispana: Estudio de su formación y contenido;* Madrid, 1941).

The Institute has also founded a new canonical magazine, *Revista Española de Derecho Canónico,* the first number of which (January-April, 1946) has just been received. Its 269 pages cover a wide range of studies, commentaries, notes, and book reviews. The philosophy of law is represented by an article on the recently much discussed juridical nature of the Canon law order, by José Maldonado (University of Valladolid: pp. 67-104), and an article on the obligation in conscience of civil laws, by Fr. Lorenzo R. Sotillo, S.J. (Pontifical University of Comillas: pp. 135-171). Three contributions deal with historical matters: the personality and juridical works of St. Raymond of Peñafort are reviewed by Canon R. Baucells (Barcelona: pp. 7-47); Dr. Ariño reports on the projected edition of the *Hispana* (pp. 195-201); and Lamberto de Echeverría (University of Salamanca) presents observations on the ecclesiastical jurisdiction of the Abbess of Las Huelgas in Burgos, which persisted from the Middle Ages into our century (pp. 219-233; the study was prompted by a book of J. M. Escrivá on this subject). Doctrinal problems of Canon law are competently treated in several articles: on *metus indirectus* in relation to the matrimonial consent, by Fr. E. F. Regatillo, S. J. (Dean of the Canon Law School, University of Comillas: pp. 49-65); on appeal against the sentence of the judge delegate, by Fr. M. Cabreros, C. M. F. (University of Salamanca: pp. 105-133); on the respective powers of Ordinaries and pastors in relation to the law on sacred times, by Fr. S. Alonso, O. P. (University of Salamanca: pp. 203-217); on bination and the *titulus iustitiae,* by S. Castillo (pp. 235-244). A special section is given to notes on recent documents

and decisions; here L. Miguelez (Rector of the University of Salamanca (pp. 175-191) comments upon the response of the Pontifical Commission for the authentic interpretation of the Code, concerning the summary procedure in can. 1990 ff. (December 6, 1943-*AAS*, XXXVI [1944], 94). A number of book reviews (pp. 247-262) and a chronicle (pp. 265-269) constitute the conclusion of the fascicle. Students of Canon law all over the world will welcome most heartily the new magazine. THE JURIST presents its congratulations on the splendid achievement and wishes the *Instituto* every success in its future activities.

"Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural capacities they could not have had. In this sense the King is a sole corporation; so is a bishop; so are some of the deans and prebendaries, distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent if we consider the case of the parson of a church. At the original endowment of parish churches, the freehold of the church, the church-yard, the parsonage-house, the glebe, and the titles of the parish were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with the intent that the same emoluments should ever afterward continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heir and would be liable to his debts and encumbrances; or, at least, the heir might be compellable, at some trouble and expense, to convey those rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson *quatenus* parson, shall never die, any more than the King, by making him and his successors a corporation."—Blackstone, *Commentaries on the Law of England*, I, 470.

Chronicle

GENERAL

Prince Giulio Pacelli, the Holy Father's nephew, has presented his credentials as Envoy Extraordinary and Minister Plenipotentiary of Costa Rica at the Vatican.

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Count Pedro de Lemos Tovar, new Portuguese Ambassador to the Holy See, has presented his credentials to our Holy Father.

Dr. Joseph P. Walshe, Ireland's first representative to the Holy See to enjoy the rank of Ambassador, presented his credentials to our Holy Father.

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"Servizio Informazione Chiesa Orientale" is the name of a bi-monthly news service established under the direction of Eugene Cardinal Tisserant, Secretary of the Sacred Congregation for the Oriental Church, to disseminate news concerning the Near East and the Middle East, as well as that affecting Eastern Rite Catholics and dissidents.

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His Excellency, the Most Reverend Apostolic Delegate to the United States, was present at the canonization ceremonies of Mother Frances Xavier Cabrini in Rome on July 7.

Rt. Rev. Msgr. Francis J. Brennan, Auditor of the Sacred Roman Rota, was subdeacon of the first Mass in honor of the new saint, celebrated by our Holy Father. Rt. Rev. Msgr. George J. Casey, D.C.L., Vicar General of the Archdiocese of Chicago, presented one of the candles to the Holy Father among the gifts offered before the Offertory of the Mass.

Rev. Salvatore M. Burgio, C.M., Vice Postulator of the Cause of Mother Seton, assisted the Holy Father during the canonization ceremonies.

Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, and Most Rev. Charles P. Greco, D.D., Bishop of Alexandria, and Very Rev. Msgr. Donald Carroll, D.C.L., attended the ceremonies. Present also were fifty chaplains of the United States forces, Myron C. Taylor, Jacques Maritain, France's ambassador, and Joseph P. Walshe, Ireland's envoy.

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His Holiness gave an audience in late August to Max H. Sorensen, of Philadelphia, National Commander of the Catholic War Veterans, and in early September, to Attorney General Tom C. Clark and William Henry Chamberlin, American writer and commentator on foreign affairs.

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Baron Ernst von Weizsaecker, former German Ambassador to the Holy See, has left Vatican City, where he had resided since the end of the war.

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The Most Rev. Apostolic Delegate celebrated on September 2 the Pontifical Mass celebrating the first centenary of the establishment of St. Vincent's College and Seminary, Latrobe, Pa. The sermon was preached by Most Rev. Michael J. Ready, D.D., Bishop of Columbus.

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Canon Rast, of Fribourg, attended as an observer for the Vatican the Council meetings of the United Nations Relief and Rehabilitation Administration which began August 5, in Geneva.

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Rev. Carol Conte, of Fribourg, and Mlle Emery, of Mission Catholique Suisse, acted as observers for the Vatican at the preliminary conference of the national societies of the Red Cross.

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The title of the Vicariate Apostolic of Papua has been changed to that of the Vicariate Apostolic of Port Moresby; the eastern portion of the mission has been erected into a distinct Prefecture Apostolic of Eastern Papua under the temporary administration of the Vicar Apostolic of Port Moresby, Most Rev. Andrew Sorin, Missionary of the Sacred Heart.

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In preparation for Independence Day in the Philippines, a Vigil of the Blessed Sacrament was observed in the Manila Quipo Church, followed by a Pontifical Mass celebrated by Most Rev. William Piani, D.D., Apostolic Delegate to the Philippines. Most Rev. Gabriel Reyes, D.D., Archbishop of Cebu, delivered the benediction at the official Independence Day ceremonies.

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His Eminence, Francis Cardinal Spellman, addressed the eighty-four graduates at the thirty-second commencement of the national academy of the Federal Bureau of Investigation. Senator H. Styles Bridges of New Hampshire, also spoke at the commencement.

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His Eminence, Samuel Cardinal Stritch, accepted an honorary degree on June 30th at the 102nd commencement of Notre Dame University, one hundred eighty-two undergraduate and thirty-two graduate students receiving diplomas.

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The thirty-second national conference of Newman Clubs was held in Chicago July 12-14, opening with a solemn Mass in Old St. Mary's Paulist Church. At the closing banquet, Samuel Cardinal Stritch was the principal speaker.

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Enrique Cardinal Pla y Deniel, Archbishop of Toledo, delivered the address closing the celebration of the fourth centenary of the death of Francisco de Vitoria, held in Salamanca together with the nineteenth world congress of Pax Romana. Prof. Ross J. S. Hoffman, of Fordham University, delivered one of the lectures which marked the occasion. Tribute was paid to Dr. James Brown Scott, formerly of Georgetown University, in whose honor the Vitoria Society struck a gold medal.

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Achille Cardinal Lienart, Bishop of Lille since 1928, presided over an early summer meeting of the French Cardinals and Archbishops.

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Most Rev. Giuseppe Beltrami, Apostolic Nuncio to Colombia, was Papal Legate at the National Marian Congress held at Bogota, July 12-16.

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The National Council of Catholic Women held its national convention in Kansas City September 21-25. The opening Mass was celebrated by the Most Rev. Apostolic Delegate. Most Rev. Emmet M. Walsh, D.D., Bishop of Charleston, preached.

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The ninety-first national convention of the Catholic Central Union of America and the thirtieth of the National Catholic Women's Union, opened August 15 in Newark with a Solemn Pontifical Mass celebrated by Most Rev. Thomas J. Walsh, D.D., Archbishop of Newark. The sermon was preached by Most Rev. William T. McCarty, C.Ss.R., D.D.

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Most Rev. John F. O'Hara, C.S.C., D.D., Bishop of Buffalo, and Most Rev. Michael J. Ready, D.D., Bishop of Columbus, arrived in Tokyo on July 4 and spent a month in Japan studying the conditions and opportunities confronting the Catholic Church in that country.

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Most Rev. J. Francis A. McIntyre, D.D., Coadjutor Bishop of New York, was the principal speaker at a banquet concluding the eleventh annual convention of the Catholic War Veterans in Newark, N. J., at which Max H. Sorensen, a convert born in Copenhagen, and a veteran of World War I, was elected National Commander.

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Most Rev. Christopher E. Byrne, D.D., Bishop of Galveston, has announced the purchase for $120,000 of a site for a university in Houston. The home purchased will accommodate two hundred students.

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Most Rev. Hugh C. Boyle, D.D., Bishop of Pittsburgh, and Most Rev. Emmanuel B. Ledvina, D.D., Bishop of Corpus Christi, celebrated the twenty-fifth anniversary of their consecration.

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The biennial convention of the Lithuanian Roman Catholic Alliance was held in Cleveland at the end of July, opening with a Mass at which the sermon was delivered by Most Rev. John R. Hagan, D.D., Auxiliary Bishop of Cleveland.

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The seventeenth biennial convention of the International Federation of Catholic Alumnae was held in Detroit in late August. Mrs. Richard G. Auspitzer, of Lawrence, Long Island, New York, was elected president.

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Most Rev. Valentine Schaaf, O.F.M., Minister General of the Order of Friars Minor, arrived in the United States in mid-August to conduct a visitation of the Franciscan provinces.

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Very Rev. James M. Voste, O.P., Secretary of the Pontifical Commission for Bible Study and Professor of Scripture at the Institutum Angelicum in Rome will lecture at twenty seminaries in the United States with a view to stimulating greater interest in Bible studies.

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The third centenary of the martyrdom of the Jesuit martyrs was observed at their shrine in Auriesville during the months of July and August with services broadcast over two hundred and fifty stations.

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The 800th anniversary of the initiation of the Second Crusade by St. Bernard was celebrated at Vezelay, France.

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A general congregation of the Society of Jesus was held in Rome on September 7 to elect a new Superior General, Very Rev. John Baptist Janssens.

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A private university, the Catholic University of St. Thomas of Villanova, was opened in ceremonies conducted by Cardinal Arteaga y Betancourt, Archbishop of Havana. It is the first private university in Cuba. The cost of the structure was $2,000,000. It will open with an enrollment of eight hundred students.

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August 15-26 a Bible Institute was held at Niagara University by the Catholic Biblical Association. Among the faculty members was Dr. William Foxwell Albright, professor at Johns Hopkins University, and author of numerous volumes of Biblical archeology.

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The centenary of the apparition of the Blessed Virgin at La Salette, near Lyon, was observed with appropriate ceremonies on June 23.

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Rt. Rev. Msgr. John W. Dowling, 75-year old pastor of Holy Name Church, Washington, D. C. observed the golden jubilee of his ordination on June 19.

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On July 31, Rev. John J. Wynne, S.J., celebrated the seventieth anniversary of his entrance into the Society of Jesus.

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A Catholic Commission on Intellectual and Cultural Affairs was formed at a meeting of scholars held at The Catholic University of America. Dr. David A. McCabe, Professor of Economics at Princeton, was elected chairman of the Commission.

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Very Rev. Robert I. Gannon, S.J., President of Fordham University addressed the graduates at the Commencement Exercises of Lafayette College, receiving the degree of Doctor of Science in Education.

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Governor Maurice J. Tobin of Massachusetts addressed the graduates at the 100th Commencement Exercises of Holy Cross College.

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On June 23 a Congress of the Blessed Virgin Mary Sodalities of the Ukrainian Catholic Diocese of the United States was held at Stamford, Conn.

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Most Rev. James E. Kearney, D.D., Bishop of Rochester, was again named Supreme Spiritual Adviser of the Knights of St. John at their convention in Cleveland in early July.

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July 8-13 the second annual Confraternity of Christian Doctrine Street-Preaching Institute for Priests was held under the auspices of Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, and under the direction of Rev. Stephen A. Leven, Ph.D.

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Early in July the Catholic Daughters of America held their twenty-first biennial convention in Chicago, reporting an expenditure for charity, religion, and education of a million dollars by its 1500 courts, the largest expenditure in the history of the organization.

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The nineteenth quadriennial convention of the Ladies Catholic Benevolent Association was held in Atlantic City in mid-July, re-electing Bertha C. McEntee as President and establishing a fund for furthering missionary work among deaf mutes in the United States.

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"The Sign", monthly magazine of the Passionist Fathers, observed the twenty-fifth anniversary of its founding.

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The thirty-second annual meeting of the National Conference of Catholic Charities was held at St. Mary's College, Holy Cross, Indiana, August 23-26.

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On September 7 the Legion of Mary observed the twenty-fifth anniversary of its founding. It was reported that there are 12 regional councils in Canada and 74 in the United States.

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The English College in Rome will reopen in October, after closing six years ago.

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The University of Ottawa's Extension Department has thousands of students in Canada and the United States following a special "Marriage Preparation

Course", a correspondence course, prepared by clerical, medical, and economic experts.

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The California State Convention of the American Federation of Labor denounced the World Federation of Trade Unions as a world-wide fifth column for communism.

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The Cuban Association of Teachers has charged the fifth Congress held in Mexico City of the American Teachers' Federation as distinctly under communistic control.

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The largest number of chaplains in the Army Chaplain Corps in the 171 years of its existence was reached on July 31, 1945, when it consisted of 5,655 Protestant ministers, 2,270 priests, and 246 rabbis. Seventy-seven were killed in action in World War II, eighty-three died in service, and two hundred and fifty-four were wounded in action. Thirty-seven have been released from German and Japanese prison camps. 1,572 chaplains won decorations.

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1,430 Catholic chaplains were separated from the army between September 1, 1945 and May 31, 1946.

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Most Rev. J. H. Leventoux, D.D., Titular Bishop of Legio and former Vicar Apostolic of the Gulf of St. Lawrence, died in Chicoutimi early in September.

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Most Rev. Francisco Gonzalez Arias of Cuernavaca, Mexico, died in mid-August at the age of 72.

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Very Rev. Columban Bregenzer, O.S.B., Vicar General of the Diocese of Rapid City, died June 20.

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President Juan Antonio Rios of Chile received the last sacraments prior to his death at the age of 58, administered by Most Rev. Augusto Salinas, Auxiliary of Santiago, acting for Caro Cardinal Rodriguez, Archbishop, incapacitated by illness.

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William Franklin Sands, Catholic, veteran United States diplomat, died in Washington at the age of 72.

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Wilhelm Marx, several times German Chancellor, died at Bonn at the age of 83.

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100 years ago Most Rev. Benedict J. Fenwick, D.D., first Bishop of Boston, died at the age of 65.

75 years ago, Most Rev. John H. Luers, first Bishop of Fort Wayne, died suddenly in Cleveland.

50 years ago, Most Rev. John J. Glennon consecrated Coadjutor Bishop of Kansas City.

25 years ago Ex-President Taft appointed Chief Justice of the Supreme Court of the United States.

DIGNITIES

Clemente Cardinal Micara has been named to the suburbicarian See of Velletri.

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Most Rev. Luigi Arrigoni, D.D., Apostolic Nuncio to Peru, was consecrated Titular Archbishop of Apamea in Syria by Clemente Cardinal Micara.

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Most Rev. Severio Ritter, who was driven from his post of Apostolic Nuncio to Czecho-Slovakia seven years ago when the Nazis overran the country, has returned to Prague as Internuncio.

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Most Rev. Antonio Riberi, D.D., formerly Apostolic Delegate to the African Missions of the Sacred Propagation of the Faith, has been named Apostolic Internuncio to China.

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Most Rev. Joseph E. Ritter, D.D., formerly Archbishop of Indianapolis, was installed as Archbishop of St. Louis on October 8th by the Most Rev. Apostolic Delegate.

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Most Rev. Paul C. Shulte, D.D., formerly Bishop of Leavenworth, was installed as Archbishop of Indianapolis, on October 10th, by the Most Rev. Apostolic Delegate.

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Most Rev. Daniel J. Feeney, D.D., was consecrated Titular Bishop of Sita and Auxiliary Bishop to Most Rev. John E. McCarthy, D.D., Bishop of Portland, Maine, on September 12 by the Most Rev. Apostolic Delegate. The co-consecrators were Most Rev. Matthew F. Brady, D.D., Bishop of Manchester, and Most Rev. Louis F. Kelleher, D.D., Auxiliary to the Archbishop of Boston. The sermon was preached by Most Rev. Richard J. Cushing, D.D., Archbishop of Boston.

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Most Rev. Leo P. Dworschak, D.D., Vicar General of the Diocese of Fargo, has been named Coadjutor with the right of succession of the Diocese of Rapid City, South Dakota, assisting Most Rev. John L. Lawler, D.D., Bishop of the see. He was consecrated August 27 in St. Mary's Cathedral, Fargo, by the Most. Rev. Apostolic Delegate. The co-consecrators were Most Rev. Vincent J. Ryan, D.D., Bishop of Bismarck, and Most Rev. William T. Mulloy, D.D., Bishop of Covington.

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Most Rev. Timothy Manning, D.D., has been named Titular Bishop of Leavi and Auxiliary to Most Rev. John J. Cantwell, D.D., Archbishop of Los Angeles.

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Most Rev. Edward A. Fitzgerald, D.D., Titular Bishop of Cantanus and Auxiliary to Most Rev. Henry P. Rohlman, D.D., Coadjutor Archbishop of Dubuque, was consecrated in St. Raphael's Cathedral, Dubuque, by the latter on September 12; the co-consecrators were Most Rev. Louis B. Kucera, D.D., Bishop of Lincoln, and Most Rev. Leo Binz, D.D., Coadjutor Bishop of Winona. The sermon was preached by Most Rev. Edward D. Howard, D.D., Archbishop of Portland, Oregon.

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Most Rev. Daniel Ivancho, D.D., has been named Titular Bishop of Europus and Coadjutor with the right of succession to Most Rev. Basil Takach, D.D., Bishop of the Greek Rite Diocese of Pittsburgh.

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Most Rev. J. Francis A. McIntyre, D.D., has been named Titular Archbishop of Paltus and Coadjutor of Francis Cardinal Spellman, Archbishop of New York.

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Most Rev. James M. Hill has been named Bishop of Victoria, B. C., succeeding Most Rev. J. C. Cody, D.D., who has been named Coadjutor Bishop of London, Ontario.

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Most Rev. M. L. Roy, D.D., Bishop of Three Rivers, has been named Military Ordinary for the Canadian forces, succeeding Most Rev. C. L. Nelligan, D.D.

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Most Rev. James Scanlan, D.D., has been appointed Coadjutor Bishop of Dunkeld, Scotland, and consecrated by Most Rev. William Godfrey, D.D., Apostolic Delegate to Great Britain. Former Chancellor of the Archdiocese of Westminster, he was last year appointed Vicar Delegate of the United States forces in Great Britain.

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Most Rev. Andrew Tynan, D.D., has been named Bishop of Rockhampton, Australia.

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Most Rev. Kazimierz Kowalski has been named Bishop of Chelmo in Poland, succeeding Most Rev. Stanislaus Okoniewski.

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Most Rev. Coloman Papp, D.D., has succeeded as Bishop of Gyoer, Hungary, Most Rev. William Apor who was killed by Russian soldiers while trying to protect a group of women from attack.

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Most Rev. Raymond A. Lane, M.M., D.D., has been elected Superior General of the Catholic Foreign Mission Society of America, succeeding Most

Rev. James E. Walsh, M.M., D.D., who has served the established term of ten years.

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Rt. Rev. Theodore G. Kojis, O.S.B., D.D., has been elected Abbot of St. Andrew's Abbey, succeeding Rt. Rev. Stanislaus Gmuca, O.S.B., D.D., who resigned. On August 29 he received the abbatial blessing from Most Rev. Edward F. Hoban, D.D., Bishop of Cleveland.

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Most Rev. Emmanuele Martin del Campo, D.D., formerly Chancellor of the Archdiocese of Morelia, Mexico, has been named Titular Bishop of Aulona and Coadjutor with the right of succession to Most Rev. Emetrio Valverde y Tellez of Leon, Mexico.

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Most Rev. Patrick Dunne, D.D., has been appointed Titular Bishop of Nare and Auxiliary to Most Rev. John McQuaid, D.D., Archbishop of Dublin.

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Most Rev. Giorgio Marcos de Oliveira, D.D., has been appointed Titular Bishop of Bagi and Auxiliary to Jaime Cardinal de Barros Camara, Archbishop of Rio de Janeiro.

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Most Rev. Enrique Alvarez Gonzalez, O.P., D.D., has been named Vicar Apostolic of Urabamba and Madre de Dios, Peru.

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The Sacred Congregation for the Propagation of the Faith has announced the appointment of three new Archbishops for China. They are Most Rev. Theodore Labrador, O.P., of Foochow, Most Rev. Joseph Chow, C.M., of Nanchang, and Most Rev. Joseph Ferruccio Rosa, O.F.M., of Hankow.

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Most Rev. Abele Ribeiro Camelo, D.D., formerly Vicar General of the Archdiocese of Goyaz, has been named Titular Bishop of Curio and Auxiliary to the Archbishop of that Archdiocese.

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Most Rev. Valerin Gracias, D.D., has been named Titular Bishop of Tenneso and first Auxiliary Bishop of Bombay.

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Most Rev. Bernard Sullivan, S.J., D.D., of Patna, India, has been transferred to the Titular See of Alicarnasso.

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Most Rev. Henry Ederle, S.V.D., has been named Prefect Apostolic of the Prefecture of Mindoro in the Philippines.

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The Medal of Freedom with silver palms has been awarded to Msgr. Hugh O'Flaherty by the United States for exceptionally meritorious conduct in the performance of outstanding services to the government of the United States in Italy, especially in aiding escaped prisoners of war. Msgr. O'Flaherty is attached to the personnel staff of the Holy Office.

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Very Rev. Sylvester P. Juergens, S.M., has been elected Superior General of the Society of Mary.

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Rt. Rev. William Van Hees, O.S.C., D.D., has been elected Master General of the Canons Regular of the Holy Cross (Crosier Fathers).

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Very Rev. James F. Cunningham, C.S.P., has been elected Superior General of the Paulist Fathers, succeeding Very Rev. Henry I. Stark, C.S.P.

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Rev. Martin T. Gilligan, of the Archdiocese of Cincinnati, has been named attache of the Papal Internunciature in China.

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Brother Athanase Emile was elected Superior General of the Christian Brothers in their General Chapter in Rome.

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Rev. Alphonse M. Schwitalla, S.J., Dean of the School of Medicine of St. Louis University, was re-elected President of the Catholic Hospital Association of the United States and Canada at the closing session of its thirty-first annual convention held in June in Milwaukee. The Association's Distinguished Service Medal was conferred by Most Rev. Karl J. Alter, D.D., Bishop of Toledo, on William Bruce in behalf of his publishing firm, publishers of *Hospital Progress,* the official organ of the Association.

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Rev. John J. Cavanaugh, C.S.C., has been elected President of the University of Notre Dame, succeeding Rev. J. Hugh O'Donnell, C.S.C., who had been President for the past six years. Rev. James W. Connerton, C.S.C., has been appointed President and Superior of King's College, Wilkes-Barre, a new college of the Community.

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Rev. Harold Rigney, S.V.D., former chaplain in the United States Army Air Forces, has been named Rector of the Catholic University of Peking.

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Rev. Ernest J. Primeau, professor at Quigley Preparatory Seminary, has been appointed Rector of the Collegio Sancta Maria del Lago in Rome.

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Rev. John W. Keogh was re-elected President of the Catholic Total Abstinence Union of America at its annual convention at Plattsburg, N. Y., in mid-August.

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Rev. Gerald B. Phelan, who since 1937 has been President of the Pontifical Institute of Medieval Studies in Toronto, has been named Director of the newly established Medieval Institute at the University of Notre Dame. Father Phelan is succeeded in Toronto by Dr. Anton C. Pegis.

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Rev. Robert Harwick has been named Superintendent of Schools of the Diocese of Columbus.

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The Grand Cross of the Order of St. Gergory the Great has been conferred on Judge John E. Swift, of Boston, Supreme Knight of the Knights of Columbus; and the rank of Grand Officer of St. Gregory has been given to Joseph F. Lamb, of New York, Supreme Secretary, and Francis J. Heazel, of Ashville, N. C., Supreme Treasurer.

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Former Prime Minister Paul Van Zeeland of Belgium has received the Medal of Freedom with bronze palm from the United States for his work as Belgian Commissioner of Repatriation from February to October 1945.

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Dr. Karl F. Herzfeld, head of the Physics Department of The Catholic University of America, and Frank A. Biberstein, associate professor, Materials Testing Laboratory of the University, were among the twenty-seven members of the staff to be honored for wartime work in research and development of naval ordnance. Rt. Rev. Msgr. Patrick J. McCormick received for the University a certificate for distinguished service to naval ordnance development.

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Appointments in the New Orleans Archdiocesan Curia have resulted in its consisting of the following personnel, an asterisk designating a previous incumbent.

Officialis: Very Rev. Joseph J. Boudreaux; Defensor Vinculi: Rev. Paul A. Melancon; Collegiate Judges: Rev. Patrick Gillespie *, Rev. Thomas U. Bolduc, S. M.*, Very Rev. Daniel C. O'Meara, S.M.*, Very Rev. Joseph Pyzikiewicz, Rev. Francis L. Baechle; Vice-Officialis: Rev. William J. Castel; Notaries: Rev. Gordon Raine, Rev. P. Raymond Moore. Rev. Charles J. Plauché, J.C.L., succeeds as Chancellor Very Rev. A. Carroll Badeaux, who died May 6.

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THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

Academic Year 1945-1946

Concilium:

Rev. Jerome D. Hannan, LL.B., S.T.D., J.C.D., Associate Professor of Canon Law, The Catholic University of America, *Magister.*

Brendan F. Brown, D.Phil. Oxon., LL.M., J.U.D., Professor of Law, The Catholic University of America, *Scriba.*

Very Rev. Robert J. White, A.B., LL.B., S.T.B., J.C.D., Dean, School of Law, The Catholic University of America, *ex officio.*

Rt. Rev. Francisco G. Lardone, S.T.D., J.U.D., Professor of Roman Law, The Catholic University of America, *ex officio.*

Ernst Levy, J.U.D., Professor of Roman Law, University of Washington, Seattle, Wash.

Stephan Kuttner, J.U.D., Professor of the History of Canon Law, The Catholic University of America.

Monthly Conferences:

October 25, 1945: Dr. Martin R. P. McGuire, Dean of the Graduate School of Arts and Sciences, The Catholic University of America: "The Language of Roman Law in the Light of the History of the Latin Language and Literature."

November 19, 1945: Dr. Huntington Cairns, Secretary-Treasurer and General Counsel, The National Gallery of Art, Washington, D. C.: "A Comparison of the Jurisprudence of Hobbes and Cicero."

December 17, 1945: Dr. Reginald Parker, Attorney, National Labor Relations Board, Washington, D. C.: "The Criteria of Civil Law."

January 24, 1946: Dr. Roscoe C. Dorsey, Washington College of Law: "The Roman Impress upon English Jurisprudence."

February 28, 1946: Dr. Elio Gianturco, Research Assistant, Foreign Law Section, Law Library of Congress: "Jhering's *Geist des römischen Rechts:* Genesis, Significance, Reception, Influence."

March 28, 1946: Dr. Melquiades J. Gamboa, Assistant Secretary to the President of the Philippines: "The Meeting of the Roman Law and the Common Law in the Philippines."

April 11, 1946: Dr. Miriam Theresa Rooney: "Borrowings in Roman Law and Christian Thought."

May 16, 1946: Rev. Dr. Jerome D. Hannan: "International Self-Help."

Concilium elected for the Academic Year 1946–1947:

Gaines Post, Ph.D., Assoc. Professor of Medieval History, University of Wisconsin, Madison, Wisc., *Magister.*

Brendan F. Brown, *Scriba.*

Very Rev. Robert J. White, *ex officio.*

Rt. Rev. Francesco G. Lardone, *ex officio.*

Rev. Jerome D. Hannan.

Stephan Kuttner.

Very Rev. John Baptist Janssens, the newly elected General of the Society of Jesus, is the twenty-seventh in the line of succession. He studied Civil Law at the University of Louvain, where he was Rector for seven years. He also studied Canon Law at the Gregorian University, Rome. He holds the degree of doctor in both Civil Law and Canon Law.

INDEX OF CANONS

Volume VI

INDEX TO VOLUME VI

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Most Rev. Leo Binz, D.D.,
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Most. Rev. Francis J. Schenk, D.D., J.C.D.,
Rt. Rev. Msgr. Dennis A. Lynch, A.M.,
Very Rev. Mark S. Ebner, J.C.L.,
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Franciscan Fathers, Oldenburg, Ind.
Friedsam Memorial Library,
Diocesan Chancery, Wichita, Kansas.
Diocesan Tribunal, Diocese of Albany.
Mount St. Mary's of the West, Norwood, Ohio.
Our Lady of Carey Seminary
Diocesan Dept. of Education, Green Bay, Wis.
Diocese of Winona, Minnesota.
Archdiocese of St. Paul